

(26,755)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 669.

—
HIAWASSEE RIVER POWER COMPANY, PLAINTIFF IN
ERROR,

vs.

CAROLINA-TENNESSEE POWER COMPANY.

—
IN ERROR TO THE SUPREME COURT OF THE STATE OF
NORTH CAROLINA.

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In the Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

Application for Writ of Error.

Hiawassee River Power Company, the above named plaintiff in error, respectfully shows that on the 28th day of May, in the year 1918, the Supreme Court of the state of North Carolina, which is the highest court in said state in which a decision in the action referred to herein could be had, rendered a judgment against your petitioner in a certain action originally brought in the Superior Court of Cherokee County, North Carolina, in which the Carolina Tennessee Power Company was plaintiff, and your petitioner, Hiawassee River Power Company, was defendant. In said action there was drawn in question the validity of the charter of the plaintiff, Carolina Tennessee Power Company, the said charter being a statute of the State of North Carolina, and the validity of certain claims, rights and actions taken by the said Carolina Tennessee Power Company, under authority of its said state charter, on the ground that said charter, and the authority claimed thereunder, were repugnant to the constitution, treaties or laws of the United States, and especially repugnant to the fourteenth amendment to the constitution of the United States, and the fifth amendment to the constitution of the United States, and the said decision of the Supreme Court of North Carolina was in favor of the validity of said statute of North Carolina, and in favor of the validity of the authority exercised thereunder, all of which will more fully and in more detail appear from the assignment of errors filed herein and herewith.

In said action certain rights, privileges and immunities were detailed and specially set up and claimed by your petitioner under the constitution of the United States, and the decision of said Supreme Court of North Carolina was against the rights, privileges and immunities so set up and claimed, all of which will more fully and in more detail appear from the assignment of errors filed herein and herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of the state of North Carolina for the correcting of the errors complained of; that an order may be entered fixing the amount of bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United

States; and that the decision and judgment of said Supreme Court of North Carolina therein may be reversed and annulled.

This 17th day of August, 1918.

ZEBULON WEAVER,
FELIX ALLEY,
J. N. MOODY,
SANDERS McDANIEL,
EUGENE R. BLACK,

*Attorneys for Hiawassee River Power Company,
Plaintiff in Error.*

Let the writ of error above prayed for issue upon execution of cost bond for \$300.00 payable to Carolina Tennessee Power Company.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

c In the Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

Assignment of Errors for the Supreme Court of the United States.

This was a civil action brought in the Superior Court of Cherokee County, North Carolina, by the Carolina Tennessee Power Company, defendant in error, against the Hiawassee River Power Company, plaintiff in error, both of which are North Carolina corporations, on the 21st day of August, 1914. The plaintiff, Carolina Tennessee Power Company, alleged that it was a corporation organized under the laws of North Carolina, by virtue of a special act of the General Assembly of that state, ratified the 16th day of February, 1909, and published in chapter 76 of the private laws of North Carolina of 1909, and that by virtue of these charter rights it had, during the year 1909, and thereafter, and before the organization of the defendant, Hiawassee River Power Company, surveyed, staked out, located and adopted, by authoratative corporation action, locations and sites on the Hiawassee River, in Cherokee County, North Carolina, for building and maintaining two hydro-electric plants for the generation of electricity to be sold for heat, light and power purposes; that it had acquired parts of the land necessary for its purposes, and had begun condemnation proceedings for other lands

d necessary for its development; that it had filed with the clerk of the Superior Court of Cherokee County, North Carolina, maps and plats of its locations, as required by its charter; that defendant company had been organized by charter granted it by the Secretary of State of North Carolina on the 13th day of July, 1914, and had purchased some lands and was proceeding to

acquire other lands lying above the proposed development of plaintiff company, which lands were necessary for plaintiff's purposes, and that defendant was in this way interfering with and obstructing and preventing plaintiff from carrying out its developments under its charter powers, and prayed for a perpetual injunction against defendant to enjoin it from so obstructing, interfering with and preventing plaintiff in its proposed developments. Defendant in its answer denied the allegation of plaintiff and plead that if plaintiff had ever acquired and adopted any locations on the Hiawassee River for its developments it had abandoned them prior to the beginning of this action; that defendant had been organized as a North Carolina corporation under a charter granted July 13, 1914, by the Secretary of State of North Carolina, agreeable to the laws of North Carolina; that under its charter it had power to establish and develop water power plants on the Hiawassee River near the town of Murphy, in North Carolina, and immediately after its organization had proceeded to acquire lands, establish locations, drill dam sites, and take all corporate and necessary steps for its development, and that its rights in said developments were superior to any rights of the plaintiff; and, as affirmative relief, it prayed for an injunction restraining plaintiff from interfering with its proposed developments. This action was tried twice in the Superior Court of Cherokee County, North Carolina; the first trial resulted in a verdict and judgment for plaintiff; an appeal was taken by defendant to the Supreme Court of North Carolina, and the Supreme Court of North Carolina, on the 29th day of March, 1916, reversed the judgment of the lower court and remanded the case to the lower court for a new

trial. The second trial in the Superior court was had on the second day of April 1917, and again resulted in a verdict and judgment in favor of plaintiff, which judgment enjoined defendant perpetually from interfering with, obstructing or preventing plaintiff from carrying out its plan for its development. Defendant appealed from this second verdict and judgment of the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina, and the said Supreme Court of North Carolina, on the 28th day of May, 1918, affirmed the judgment of the lower court.

Hiawassee River Power Company, plaintiff in error in the Supreme Court of North Carolina, and plaintiff in error in the Supreme Court of the United States, respectfully assigns as errors in the record and in the proceedings in this case in the Supreme Court of North Carolina, the following:

1. The Supreme Court of North Carolina erred in holding, in its decision of May 28, 1918, that the charter of the Carolina Tennessee Power Company, granted it by virtue of a special act of the General Assembly of the state of North Carolina, was valid, said charter being invalid and unconstitutional, in that it abridges the privileges and immunities of defendant, and empowers plaintiff to deprive defendant of its property without due process of law, and deprives defendant of the equal protection of the law in that it is

vicious and arbitrary class legislation, contrary to the fourteenth amendment to the constitution of the United States.

2. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court of Cherokee County North Carolina, in that by its judgment it enjoined defendant, Hiawassee River Power Company, from proceeding with its development on the Hiawassee River, and in this way deprived defendant of its property and its property rights in its lands along the Hiawassee River, and its property rights in said river, without compensation, f contrary to the fifth amendment to the constitution of the United States, and in this way deprived defendant of its constitutional rights, privileges and immunities.

3. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina Tennessee Power Company, was entitled to judgment of injunction in this cause because that the undisputed evidence in this cause showed that said company owned no "water power proposition" upon said Hiawassee River and was, therefore, entitled to no judgment of injunction against this defendant to prevent its development of its "water power proposition" upon said river, which judgment deprived defendant of its property without due process of law and denied it the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

4. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to an injunction against defendant, Hiawassee River Power Company, in this cause because that the undisputed evidence shows that plaintiff company had never located any dam sites or made any locations for power plants upon the Hiawassee River, and for that reason was entitled to no legal or equitable relief against defendant, Hiawassee River Power Company, and in this way said judgment denied to defendant Hiawassee River Power Company, the equal protection of the law, and deprived it of its property and its property rights without due process of law, contrary to the fourteenth amendment to the constitution of the United States.

5. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina Tennessee Power Company, was entitled to an injunction in this cause because that the undisputed evidence shows that plaintiff, Carolina Tennessee Power Company, had g never filed any map or survey of its locations upon the Hiawassee River, as required by its alleged charter as a condition precedent to any rights it might claim upon said river, and, therefore, it had no rights, legal or equitable, against this defendant, and in this way said judgment denied to defendant, Hiawassee River Power Company; the equal protection of the law, and deprived defendant of its property rights without due process of law; all contrary to the fourteenth amendment to the constitution of the United States.

6. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to injunction in this cause against defendant, Hiawassee River Power Company, because that the undisputed evidence in this cause showed

the plaintiff, Carolina Tennessee Power Company, had abandoned any purpose it may have ever had of developing a water power plant upon the Hiawassee River prior to the organization of defendant company, and for this reason was entitled to no injunctive relief against defendant, Hiawassee River Power Company, and in this way said judgment deprived the defendant, Hiawassee River Power Company, of its property and its property rights without due process of law, and denied it the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

7. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina Tennessee Power Company, was entitled to injunction in this cause because that the charter of plaintiff company, under which its powers rested, was unconstitutional and void in that it conferred powers upon it which enabled it to deprive the defendant, Hiawassee River Power Company, of its property without due process of law, and denied defendant the equal protection of the law; all contrary to the fourteenth amendment to the constitution of the United States.

8. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina Tennessee Power Company, was entitled to an injunction against defendant in this cause because that under the evidence in this cause the highest rights of the plaintiff company were those of a riparian land owner only, and as such riparian land owner it was entitled to no injunction relief against defendant, Hiawassee River Power Company, whose lowest rights were those of an adjoining riparian land owner upon the same stream, to-wit, the Hiawassee River, and in this way said judgment of injunction deprived defendant, Hiawassee River Power Company, of its rights upon said river without due process of law, and denied to defendant equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

9. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to injunctive relief in this cause because that under the undisputed evidence in said cause, and under the law, plaintiff, Carolina Tennessee Power Company, had a full and adequate remedy at law, and said judgment was in this respect contrary to law and in effect denied to the defendant, Hiawassee River Power Company, due process of law and the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

10. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to an injunction in this cause because that under the undisputed evidence, and under the pleadings, in this cause it was shown that the plaintiff, Carolina Tennessee Power Company, had made no offer of compensation to defendant for its property rights upon the Hiawassee River, sought to be taken by the Carolina Tennessee Company by means of an injunction in this cause, prior to or during the trial of this cause, and said judgment of injunction in this cause denied to defendant, Hiawassee River Power Company, due process of law and the equal protection of the law, contrary to the fourteenth amendment

i to the constitution of the United States, and by means of said injunction deprived the defendant, Hiawassee River Power Company, of its property and its property rights upon said river without compensation, contrary to the fifth amendment to the constitution of the United States.

11. The Supreme Court of North Carolina erred in holding that as between water power companies upon a non-navigable stream in the United States that company is entitled to prior rights to a location for water power purposes upon such river which "first defined and marked its route and adopted the same for its permanent course, or location by proper and authoritative corporate action"; and the Supreme Court of North Carolina erred in so holding in its first decision rendered in this cause on the 29th day of March, 1916, such original and repeated holding being unwarranted in the law, and being in effect a deprivation to this defendant, Hiawassee River Power Company, of its property rights upon said river without due process of law, and denied to it the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

12. The Supreme Court of North Carolina erred in holding that the Legislature of the State may grant the power of eminent domain to one public service corporation without granting the same power to other corporations of like character, and may restrict such power of eminent domain to certain localities within the state and protect other localities from its exercise therein, and may modify for one corporation the general law of the State relative to condemnation of property without making such modification universal throughout the State, such holding being contrary to law and in its effect denying this defendant, Hiawassee River Power Company, the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States.

13. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to injunctive relief in this cause upon the ground that said company was not attempting to condemn any property of defendant in this cause because that in this action the injunction granted plaintiff, Carolina Tennessee Power Company, in effect takes away defendant's rights in its property, its lands and its rights upon said Hiawassee River for its development purposes, and in this way deprives the defendant, Hiawassee River Power Company, of its property and property rights without due process of law, and denies it the equal protection of the law, contrary to the fourteenth amendment to the constitution of the United States, and in effect deprives defendant of its property and its property rights without any compensation, contrary to the fifth and fourteenth amendments to the constitution of the United States.

j 14. The Supreme Court of North Carolina erred in holding that certain deeds to lands made to defendant, Hiawassee River Power Company, after the commencement of this action, said deeds covering lands upon the Hiawassee River bought for its development purposes upon said river, such lands being contracted for by defendant, Hiawassee River Water Company, prior to the institution of this

action, were inadmissible in evidence, it being averred that said deeds were admissible on the question of the good faith of defendant, Hiawassee River Power Company, in proceeding with its developments, and as illustrating its good faith in its developments, and in support of the affirmative relief sought by defendant against plaintiff.

15. The Supreme Court of North Carolina erred in holding that "the refusal of a non-suit was also proper whether or not the plaintiff should have had an injunction as it is entitled to the other relief prayed for," because that non-suit should have been granted defendant in this cause, and plaintiff's petition prayed for no other relief against defendant except injunctive relief.

16. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina Tennessee Power Company, was entitled to injunctive relief because the undisputed evidence showed that plaintiff, Carolina Tennessee Power Company, was not making, and had never made, any actual development of the water power upon the Hiawassee River, and nothing that defendant had done, or was intending to do, would interfere with any development of the Carolina Tennessee Power Company in progress upon said river, and in the absence of such actual development plaintiff's remedy against defendant was adequate at law.

17. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"In this connection, it may be well to direct your attention to this proposition of law: In case of a contest between two corporations, which are engaged in a public utility, and are clothed with practically the same power of condemnation, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the company."

it being contended that such charge was erroneous in that it did not state the correct law in regard to the rights of riparian land owners or proposed power companies upon a non-navigable stream prior to any actual development by either party upon said stream.

18. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"There is another principle; where a priority of right has been secured by priority of location, such prior right cannot be defeated by a rival company agreeing with the owners and purchasing the property; nor can it be defeated by condemnation; that is to say, if one rival company surveys, defines, marks and adopts the location of property which it proposes to acquire for purposes of public utility, another company cannot occupy the same territory, and defeat the claims of the first by condemnation or by purchase,"

it being contended by defendant, Hiawassee River Power Company,

that such charge did not state the correct law relative to the respective rights of riparian land owners or power companies prior to any actual development by either party upon a non-navigable stream in the United States.

19. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"Now, gentlemen of the jury, what is meant by the word 'abandonment', as used in this issue? Did the plaintiff abandon its locations and proposed plans? To abandon a right or to abandon property means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon and an external act by which such intention is carried into effect. There must be a concurrence of intention to abandon a right to property with actual relinquishment of it or giving it up. It is a well settled principle that to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title; mere lapse of time, mere delay in asserting a claim or mere period of time during which no work was done, would not be sufficient in itself to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right,"

it being contended that such charge did not state the correct law relative to an abandonment of its proposed location by a power company upon a non-navigable stream in the United States.

20. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County by E. B. Novell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, or either of them for and on behalf of the plaintiff during office hours, on or about June 21st, 1911, and were there delivered to the Clerk and the Clerk was then and there informed that the maps were placed in his custody under the terms of the plaintiff's charter, that this was necessary in order to enable the plaintiff to condemn land under the charter, and the Clerk received the maps in his official custody to be kept on file in the office and that Novell and Smith or either of them, in good faith left the papers there to be kept on file as a record of the office, you will then answer the fourth issue 'Yes;' although you may further find from the evidence that the word 'filed' was not, in fact, endorsed upon the maps by the Clerk. Unless you answer this issue 'Yes' under the instructions, you will answer it 'No;'"

it being contended by defendant, Hiawassee River Power Company, that such charge did not state the correct law relative to filing of its maps and survey of its locations upon the river as required by plaintiff company's charter.

21. The Supreme Court of North Carolina erred in holding that

the charter of plaintiff, Carolina Tennessee Power Company, was valid and constitutional, because that said charter was not enacted by the Legislature of North Carolina in conformity to Section 12, Article II of the Constitution of North Carolina, and because that said charter had in effect been repealed by amendment to the constitution of North Carolina, adopted in 1916, and known as Section 29 of Article II of the constitution, such holding and judgment depriving the defendant, Hiawassee River Power Company, of its property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

22. That the Supreme Court of North Carolina erred in holding that the plaintiff, Carolina Tennessee Power Company, was entitled to injunction in this case, and in affirming the judgment of injunction granted by the lower court, because that the evidence showed that said plaintiff company was guilty of such gross laches in its conduct relative to any proposed development upon said River as to deprive it of any right to equitable relief against the defendant, Hiawassee River Power Company.

23. The Supreme Court of North Carolina erred in holding that the trial court did not err in refusing to grant defendant's motion to set aside the verdict of the jury and grant defendant a new trial and in awarding judgment of injunction against defendant in this action.

24. The Supreme Court of North Carolina erred in affirming the judgment of the lower court, and erred in rendering final judgment against defendant, Hiawassee River Power Company, for the reasons hereinbefore assigned.

Wherefore, for these and other manifest errors appearing in the record, said Hiawassee River Power Company, plaintiff in error, prays that the judgment of said Supreme Court of North Carolina be reversed, be set aside, and held for naught, and that judgment be rendered for plaintiff in error, Hiawassee River Power Company, granting its rights under the law and under the constitution of the United States; and plaintiff in error also prays a judgment for its costs.

This the 17th day of August, 1918.

ZEBULON WEAVER,
FELIX ALLEY,
J. N. MOODY,
SANDERS McDANIEL,
EUGENE R. BLACK,

*Attorneys for Hiawassee River Power Company,
Plaintiff in Error.*

o Filed Aug. 19, 1918, in Supreme Court North Carolina.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of North Carolina before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Hiawassee River Power Company, plaintiff in error, and Carolina Tennessee Power Company, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Hiawassee River Power Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 20 day of August in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States District Court, Eastern District of N. C., at Raleigh.]

S. A. ASHER,
Clerk of the United States District Court,
District of North Carolina.

Allowed by:

WALTER CLARK,

Chief Justice of the Supreme Court of North Carolina.

[Endorsed:] Writ of Error. Filed Aug. 19, 1918. In Supreme Court, North Carolina.

In the Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of North Carolina:

The above named plaintiff in error hereby directs you to forward to the Supreme Court of the United States the following parts of the record in this case:

1. The transcript of the record in the Supreme Court of North Carolina from the Superior Court of Cherokee County, North Carolina, including all pleadings, the issues, judgment of the Superior Court of Cherokee County, motion for new trial and order overruling same, and appeal to Supreme Court of North Carolina; statement of case on appeal, including evidence and charge of the court and exceptions.

2. Assignments of error to the Supreme Court of North Carolina.

3. The judgment and opinion of the Supreme Court of North Carolina, dated May 28, 1918.

4. Judgment and opinion of the Supreme Court of North Carolina, dated March 29, 1916.

5. The original writ of error and citation based thereon; copies of the petition for writ of error, order allowing writ of error, the bond, the assignment of errors, the acknowledgment of service of papers, and of this præcipe.

This August 17th, 1918.

ZEBULON WEAVER,
FELIX ALLEY,
J. N. MOODY,
SANDERS McDANIEL,
EUGENE R. BLACK,
Attorneys for Plaintiff in Error.

Service of the above præcipe is hereby acknowledged; copy thereof received; and all other and further notice and service is waived.
August 27th, 1918.

MARTIN, ROLLINS & WRIGHT,
Attorneys for Defendant in Error.

8 Filed Aug. 19, 1918, in Supreme Court, North Carolina.

UNITED STATES OF AMERICA, ss:

To the Carolina Tennessee Power Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of North Carolina, where in the Hiawassee River Power Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of the state of North Carolina, this 17 day of August, in the year of our Lord one thousand nine hundred and eighteen.

WALTER CLARK,
*Chief Justice of the Supreme Court of the
State of North Carolina.*

On this 23 day of August, in the year of our Lord one thousand nine hundred and eighteen, personally appeared before me Garland A. Thomasson, the subscriber, and makes oath that he delivered a true copy of the within citation to Martin, Rollins and Wright, attorneys for Carolina Tennessee Power Company.

[Seal Marcus Erwin, Notary Public, Buncombe County, N. C.]

GARLAND A. THOMASSON.

Sworn to before me and subscribed in my presence this 23 day of August, A. D. 1918.

MARCUS ERWIN.

t Due and legal service of the within citation acknowledged; copy thereof received; all other and further service and notice waived. This 27th day of August, A. D. 1918.

MARTIN, ROLLINS & WRIGHT,
*Attorneys for Carolina-Tennessee Power
Company, Defendant in Error.*

[Endorsed:] Citation. Filed Aug. 19, 1918, in Superior Court, North Carolina.

In the Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

Acknowledgment.

Due and legal service of the citation, petition for writ of error, assignment of errors, and all other proceedings connected with the writ of error from the Supreme Court of the United States to the Supreme Court of the state of North Carolina, in the above cause, is hereby acknowledged. All other and further service waived.
This 27th day of August, 1918.

MARTIN, ROLLINS & WRIGHT,

*Attorneys for Carolina-Tennessee Power
Company, Defendant in Error.*

Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

*Defendant's Objections to the Preceipe of the Plaintiff in Error in
This Cause.*

To the Clerk of the Supreme Court of North Carolina:

The above named Defendant in Error, Carolina-Tennessee Power Company, hereby objects and protests against the sending to the Supreme Court of the United States, as a part of the record in the above entitled cause, the judgment and opinion of the Supreme Court of North Carolina, dated March 29, 1916, called for and enumerated in the portions of the record desired to be certified by the Plaintiff in Error, for the reason that said judgment and opinion forms no part of the record of this cause, is not a part of the case on appeal to the Supreme Court of North Carolina upon the final hearing of this cause, and does not come under the rule of the Supreme Court of United States governing such matters and should not for any reason be included in the transcript of the record in this cause. This the 28th day of August, 1918.

MARTIN, ROLLINS & WRIGHT,

Counsel for Defendant in Error.

Service of the above objections and exceptions is hereby accepted, copy thereof received, and all other and further notice of service thereof is waived, this August 30th, 1918.

McDANIEL & BLACK.

w [Endorsed:] Hiawassee River Power Co. v. Carolina-Tennessee Power Co. Defendant's Objections to Precipe of Plaintiff in Error. Martin, Rollins & Wright, Attorneys and Counsellors at Law, Asheville, N. C.

x In the Supreme Court of North Carolina.

HIAWASSEE RIVER POWER COMPANY, Plaintiff in Error,

v.

CAROLINA-TENNESSEE POWER COMPANY, Defendant in Error.

Bond.

Know all men by these presents, that we, Hiawassee River Power Company, a corporation of the state of North Carolina, as principal, and National Surety Company, a corporation of New York City, as surety, are held and firmly bound unto the Carolina Tennessee Power Company, its successors and assigns, in the full and just sum of five hundred dollars (\$500.00), for the payment of which well and truly to be made we hereby jointly and severally bind ourselves and our successors firmly by these presents.

Whereas, lately, at a hearing before the Supreme Court of North Carolina, in a suit pending in said court between the said Carolina Tennessee Power Company and said Hiawassee River Power Company, a final judgment was rendered against said Hiawassee River Power Company, and said Hiawassee River Power Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment;

Now, therefore, the condition of this obligation is such that if the said Hiawassee River Power Company, as plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs that may be adjudged against it, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

y In witness whereof, the said Hiawassee River Power Company, as principal and the said National Surety Company, as security, have hereunto set their hands and seals this 16th day of August in the year of our Lord one thousand nine hundred and eighteen.

HIAWASSEE RIVER POWER
COMPANY,

By H. F. VAN DEVENTER,

President, as Principal.

NATIONAL SURETY COMPANY,

By MARK W. BROWN,

Attorney-in-Fact, as Surety.

[SEAL.]

The foregoing bond is hereby approved, this 17th day of August, 1918.

WALTER CLARK,
Chief Justice of the Supreme
Court of North Carolina.

Organization of the Court.

NORTH CAROLINA,
Cherokee County:

Superior Court, April Term, 1917.

CAROLINA-TENNESSEE POWER COMPANY

vs.

HIAWASSEE RIVER POWER COMPANY.

Be it remembered that a Court of Law is opened and held for the County of Cherokee, State of North Carolina, at the Court House in Murphy, on the 4th Monday after the first Monday in March, in the year of our Lord, one thousand nine hundred and seventeen.

A court of law is opened and held for the County of Cherokee, and on the last named day, Honorable W. J. Adams, of Moore County, Judge of the 13th Judicial District, is present and presiding.

And G. L. Jones, Solicitor of the 20th Judicial District, prosecuting in behalf of the State, is present.

Comes P. C. Gentry, Sheriff of Cherokee County, and returns into Court in obedience to the writ of venire facias heretofore to him directed, he has summoned the good and lawful citizens as jurors for the first week, to-wit: W. M. White and thirty-five others, and for the second week, towit: W. C. Ensley and seventeen others.

And the Court duly convenes, and the following proceedings are had:

CAROLINA-TENNESSEE POWER COMPANY

against

HIAWASSEE RIVER POWER COMPANY.

Summons for Relief.

CHEROKEE COUNTY:

In the Superior Court.

(Title of Cause.)

The State of North Carolina to the Sheriff of Cherokee County,
Greeting:

You are hereby commanded to summon Hiawassee River Power Company, the defendant above named, if it be found within your

County, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Cherokee at the court house in Murphy on the 9th Monday after the first Monday of September, it being the 9th day of November, 1914, and answer the complaint which will be deposited in the office of the Clerk of the Superior Court of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer said complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Herein fail not, and of this summons make due record.

Given under my hand and seal of said court this 21st day of August, 1914.

(Signed)

A. A. FAIN,
Clerk Superior Court.

Endorsed: Received Aug. 21st, 1914. Served Aug. 21st, 1914, by reading and delivering a copy of within summons to P. E. Nelson, Secretary and Treasurer of Hiawassee River Power Company. (Signed) C. E. Hill, Sheriff Cherokee County.

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Complaint.

NORTH CAROLINA,
Cherokee County:

In the Superior Court.

(Title of Cause.)

The plaintiff, for its complaint, which is to be used as an affidavit for injunctive relief, says on information and belief:

1. The plaintiff is a corporation duly organized and existing under and by virtue of a Special Act of the General Assembly of North Carolina, passed and ratified the 16th day of February, 1909. The objects for which the plaintiff was established are, among others, to supply light, heat and power, electrical, steam or otherwise, to individuals and corporations, private or municipal.

2. The said Special Act of the General Assembly of North Carolina contained, among others, the following provisions:

Sec. 5. That said corporation shall have the following power:

(a) To supply to the public, including both individuals and corporations, whether private or municipal, within the State of North Carolina and elsewhere, power in the form of electric current, hydraulic, pneumatic and steam pressure, or any of the said forms, or in any other form, for use in driving machinery, and for light, heat and all other uses to which the power so supplied can be applied, and to fix, charge, collect and receive payment therefor; and for the purpose of enabling the Company to supply power as aforesaid, the company is authorized and empowered to erect, build and maintain any dam or dams, flume or flumes, ditch or ditches, and to buy or other-

wise acquire, generate, develop, store, use, transmit and distribute power of all kinds, and to locate, acquire, construct, equip and maintain and operate lines for the transmission of power by wires or poles, or underground, and by cables, pipes, tubes, conduits and all other convenient appliances for power transmission, including railroads or railways, with such connecting and branch lines within the State of North Carolina or elsewhere as the Board of Directors may locate or authorize to be located, for receiving, transmitting and distributing power, and to acquire, own, hold, sell or otherwise dispose of water power and water privileges in the State of North Carolina, and locate, acquire, construct, equip, maintain and operate all necessary plants for generating and developing by water, steam or by any other means, and for storing, using, transmitting, distributing, selling and delivering power, including dams, gates, bridges, sluices, tunnels, stations and other buildings, and all other works, structures, machinery and appliances which may be necessary to the operation of said plants:

Provided, that the lines and appurtenances hereinbefore authorized for distributing power and light, are to be constructed, when on public streets or highways of any county, city or town, under such reasonable regulations as the authorities respectively thereof shall upon application from the company prescribe.

(d) To acquire by purchase, condemnation or other proper method, the right to use, employ and divert the water flowing and running in any stream or water course, not navigable, in North Carolina, which may be necessary to the exercise of any of the powers of a public or quasi public character herein granted to the said corporation; and whenever it shall be necessary to divert the water from any such stream or water course to be used for any of the purposes herein provided, the said corporation shall have the right to have the value of said water so to be diverted, and the land so to be used over which it shall be banked, ponded or conducted, condemned, and the value thereof assessed in the manner hereinafter provided for the condemnation and valuation of land and other property.

Sec. 6. That said corporation shall have the power and authority to construct and maintain dams across any stream or streams in North Carolina not declared by law to be navigable, at any point or points, place or places on land, now owned, or hereafter acquired by it in North Carolina or elsewhere by purchase or by condemnation in the manner hereinafter prescribed, and acquire land and water by purchase or condemnation or other lawful method, for the purpose of building dams, ponding and storing water to be used either as a water supply, or as a motive power, for any railroad or railway, or street railway or motor line, machinery, power plant, mill, factor, or other business the said company may desire to operate, or to supply water or power to individuals or corporations, and of producing power by means of any such dam or dams for sale, and of selling the same, and to that end and for any other purpose, it may install, use and operate any and all machinery considered desirable or necessary. This section shall be considered and construed to authorize the manufacture of electricity or other power with the water power produced

by means of such dams, and the selling of such electricity or power, and the right to transmit the same to consumers by wires, poles, cables and conduits, or any other approved method of transmission, and the right to condemn land and water for such purposes; also said power may be used by said company for propelling or running its railroads, railways or street railways, or motor lines, and telephone or telegraph lines, and boats or for any other purpose.

Sec. 8. It shall be lawful for the president and directors, their agents, superintendents, engineers or others in their employ, to enter at all times upon all lands or water for the purpose of exploring or surveying the lands and water required by said company for the location of any of its works, or for the conducting of the business, or any part of said business, hereinbefore authorized in paragraphs *a, b, c* and *d* of section five, and of locating said works, doing no unnecessary damage to private property; and when the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the County in which the said land lies, then it shall be lawful for the said company, by its officers, agents, engineers, superintendents, contractors and others in its employ, to enter upon, take possession of, have, hold, use and excavate and fill in such lands, and to erect all the necessary and suitable structures for the erection, completion, repairing and operating of said works, subject to such compensation as is hereinafter provided: Provided, however, that said company shall not enter upon or break ground upon the premises, except for the purposes of surveying, without the consent of the owner, until such owner's damages are agreed upon between such owner and said company, or ascertained by the method hereinafter provided and such damage has been paid to such owner; and provided further, that such locating of its works and filing its surveys in the office of the clerk of the Superior Court shall not preclude said company from making, from time to time, other location of works and filing surveys of the same as its business and its development require; and whenever any land for the location of a dam or dams, lake or lakes, or a canal or canals, or for ponding water, or any other lands or rights-of-way may be required by said company for the purpose of constructing and operating its railroads or railways, street railways or motor lines, telegraph or telephone lines or other works, or for the conducting of the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company at a valuation of three commissioners, or a majority of them, to be appointed by the Clerk of the Superior Court of the County in which the land to be condemned lies or the clerk of the adjoining county if the land lies in more than one county.

3. During the year 1909, officers, engineers and other representatives of the plaintiff entered upon, explored and surveyed the lands bordering on and the water in, the Hiawassee River, a stream in Cherokee County, in North Carolina, not declared by law to be navigable, and during the said year 1909 the plaintiff determined

and adopted, by action of its Board of Directors, the location of works for the development of water power and generation of electricity, consisting of dams, reservoirs, flumes, power plants and other structures, and caused to be marked upon the ground the location of said works and the lands necessary therefor. The location of said works extends upon and along the banks of the Hiawassee River from a point about five hundred feet above the mouth of Cane Creek and the spiral of the Louisville & Nashville Railroad Company near the Tennessee State line to a point about two thousand feet above the mouth of the Nottley River, and for about three thousand feet up the Nottley River. Thereafter, and principally during the year 1910, the plaintiff acquired by purchase a large portion and considerably over one-half in area of the lands necessary for said works. In or about June, 1911, the plaintiff deposited in the office of the Clerk of the Superior Court of Cherokee County a survey of said works showing the location thereof and the lands necessary therefor, which said survey is referred to and made a part of this complaint, and thereafter the plaintiff commenced actions to acquire by condemnation certain lands necessary for said works, the plaintiff being unable to agree with the owners for the purchase thereof, which said actions are still pending. The plaintiff has also conducted negotiations and entered into contracts or options for the purchase of other lands necessary for said works.

4. The plaintiff has been at all times since its incorporation, and still is, actively engaged in carrying out its plans for the development of the water power of the Hiawassee River, the purchase or condemnation of the necessary lands therefor, and the construction of works for the generation of electric current for sale to the public for light, power and other purposes.

5. The defendant is a corporation organized under the general Law of North Carolina, on the 13th day of July, 1914, for the alleged purpose, among other things, of supplying to the public electric current for light, power and other purposes, and developing the water power of the Hiawassee River in the County of Cherokee for the purpose of generating electric current. Immediately after its incorporation the defendant acquired from one Hugh Vandeventer certain lands and contracts or options for the purchase of certain other lands upon and along the banks of the Hiawassee River between the Tennessee State line and the junction of the Nottley River, and commenced actions for the purpose of condemning certain other lands on said river between the State line and the junction of Nottley River, all of which lands are necessary for the works of the plaintiff, as shown by marks upon the ground, and the survey thereof deposited by the plaintiff in the office of the Clerk of the Superior Court of Cherokee County in June, 1911. The defendant threatens to acquire, and is attempting to acquire, by purchase or condemnation, other lands upon and along the banks of the Hiawassee River, which are necessary for the works of the plaintiff, and also threatens to place upon said lands dams, reservoirs, power houses and other structures and machinery. The use of said lands by the defendant is inconsistent with the use thereof by the plaintiff for the purposes above stated.

6. Said Hugh Van Deventer has for more than two years, and the defendant has at all times since its incorporation, had knowledge of the plans and purposes of the plaintiff with respect to the development of the water power on the Hiawassee River and the location of the works of the plaintiff as marked upon the ground, and shown by the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County. The acts of the defendant as above set forth have interfered, and if continued will still further interfere, with the rights of the plaintiff and the development and completion of its said plans and purposes. The defendant has not been incorporated in good faith for the purpose of supplying electric current to the public, but has been incorporated in bad faith, and for the unlawful purpose of interfering with the vested rights and lawful plans and purposes of the plaintiff.

7. The plaintiff intends to appropriate and use the waters of the Hiawassee River, and the lands bordering thereon between said point about five hundred feet above the mouth of Cane Creek and said point about two thousand feet above the mouth of the Nottely River, and for about three thousand feet up the Nottely River, for the development of water power and the generation of electric current and the construction of works therefor, and the sale of such current to the public for light, power and other purposes. Such use of said waters and lands is a public use. The rights of the plaintiff with respect to said waters and lands for such purposes are prior and superior to any rights of the defendant with respect thereto. The plaintiff intends in good faith to acquire, by purchase or condemnation, all lands necessary for said works which it has not already acquired, including the lands which the defendant has purchased or taken contracts or options to purchase, and the lands which

10 the defendant has commenced actions to condemn.

8. If the defendant is permitted to acquire or use any of the lands necessary for the works of the plaintiff or to commence or prosecute actions for the condemnation of any thereof, or to construct upon such lands any dams, reservoirs, power houses or other structures, the plaintiff will be greatly annoyed and delayed in carrying out its plans and will suffer irreparable injury, for which there is now no adequate remedy at law.

Wherefore, the plaintiff pays for an injunction perpetually restraining the defendant, its officers, agents, servants and employees from:

(1) Purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works of the plaintiff as shown by marks upon the ground, or the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County;

(2) Prosecuting any actions heretofore commenced for the condemnation of any lands, or commencing hereafter any actions for the condemnation of any thereof;

(3) Entering upon or constructing or placing any dams, reservoirs, power houses or other structures or machinery upon any such lands and

(4) Doing or committing acts or things which would interfere

with the rights of the plaintiff, or the prosecution or completion of its plans and purposes as herein set forth, or which would annoy, delay or harrass the plaintiff in carrying out such plans and purposes.

And further prays for a temporary injunction restraining the defendant from doing or committing any of such acts or things during the pendency of this action.

11 And further prays for such other and further relief as may be just and proper in the premises.

EDMUND B. NORVELL.

WITHERSPOON & WITHERSPOON.

M. W. BELL.

STATE OF NEW YORK,

County of New York, ss:

Wilfred V. N. Powellson, being duly sworn, says that he is President of the Carolina-Tennessee Power Company, the plaintiff herein; that he has read the foregoing complaint; that the same is true of his own knowledge, except as to the matters and things herein set forth on information and belief, and as to those matters and things he believes it to be true.

W. V. N. POWELLSON.

Subscribed and sworn to before me this 18th day of August, 1914.

HARRY DUNNING,

Notary Public, Bronx County, New York.

Certificate filed New York County.

Answer.

CHEROKEE COUNTY:

In the Superior Court.

(Title of Cause.)

The defendant Hiawassee River Power Company, answering the complaint herein, for its answer which is to be used as an affidavit for affirmative relief by way of injunction alleges:

1.

12 It admits that the Carolina-Tennessee Power Company was chartered by an Act of the General Assembly of North Carolina on the 16th day of February, 1909, but it has no knowledge or information sufficient to form a belief as to whether it was ever organized in a proper way, and while the objects for which it was professedly chartered were, among other things, to supply light, heat and power, electrical, steam or otherwise, to individuals and corporations, private and municipal, this defendant does not believe and on information and belief alleges that it was never the honest

purpose of the incorporators procuring the said charter to carry out any of the objects for which it was created.

2.

This defendant has no knowledge or information sufficient to enable it to form a belief as to whether the provisions of the charter of the Carolina-Tennessee Power Company are correctly set out in the second paragraph of said complaint.

3.

This defendant has no knowledge or information sufficient to enable it to form a belief as to whether during the year 1909, officers, engineers and other representatives of the plaintiff entered upon, explored and surveyed the lands bordering on, and the water in, the Hiawassee River, and as to whether during the said year the Carolina-Tennessee Power Company determined and adopted, by an act of its Board of Directors, the location of works for the development of water power and generation of electricity, construction of dams, reservoirs, flumes, power plants and other structures. And on information and belief this defendant denies that the plaintiff caused to be marked upon the ground the location of said works and the lands necessary therefor. This defendant has no knowledge or

information sufficient to form a belief as to *whether* the location of said work begins and where it ends nor was any information ever furnished it until the preposterous claims of this plaintiff, as set forth in this complaint, were made. This defendant denies that at any time thereafter the Carolina-Tennessee Power Company acquired by purchase any large portion, and considerably over one-half in area of the lands within the territory set forth. This defendant does not know how little land would be necessary for the works of the plaintiff, but if the plaintiff means to say that it has acquired by purchase more than one-half of the land abutting in the Hiawassee River between the mouth of Cane Creek, near the Tennessee line, to a point 2,000 feet above the mouth of Nottley River and 3,000 feet up the Nottley River, the same is wholly untrue. This defendant denies on information and belief, which information is derived from the proper officer of the Court, that on or about June, 1911, the plaintiff deposited in the office of the Clerk of the Superior Court of Cherokee County, a survey of said works showing the location thereof and the lands necessary therefor. This defendant admits that at some time in the last six years the Carolina-Tennessee Power Company did commence certain actions to acquire by condemnation certain lands abutting on the Hiawassee River, but said actions have never been prosecuted, and many of them must have lapsed. This defendant admits that the plaintiff did at some time during said period take a lot of options to purchase lands abutting on said River, most of which it has long ago permitted to lapse and all the rights of the plaintiff thereunder to become lost; and this defendant says that the plaintiff has

done nothing since its incorporation looking to the honest carrying out of the purposes of its creation except at times when other persons and corporations were making efforts to come into the field, and as soon as it succeeded in disgusting and driving such persons and corporations away activities promptly ceased; all as hereinafter set out more fully and more in detail.

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4.

This defendant denies that the plaintiff has been at all times since its incorporation, and still is, actively engaged in carrying out its plans for the development of the water power of Hiawassee River; the purchase or condemnation of the lands necessary therefor; and the construction of works for the generation of electric current for sale to the public for light, power and other purposes; and on the contrary thereof this defendant alleges that during most of the time since it was created it has done absolutely nothing and at no time since its creation has it done anything in the way of construction of any works of any kind whatever.

5.

This defendant admits that it is a corporation, organized under the general laws of the State of North Carolina on the 13th day of July, 1914, for the purpose, among other things, of supplying to the public electric current for light, power and other purposes, and developing the water power in Hiawassee River in the County of Cherokee, for the purpose of generating electric current. Immediately after its incorporation one Hugh Van Deventer who had been purchasing lands for the purposes of the corporation, and taking contracts for the purchase of other lands for the purposes of the corporation, which lands lay along the banks of the Hiawassee River between the Tennessee State line and the Town of Murphy, turned all of said lands and contracts over to this defendant, and this defendant soon after its organization did commence in the Superior Court of Cherokee County certain actions for the purpose of condemning certain other lands which it has been unable to buy, lying along said River within said territory. And this defendant admits that it intends to acquire and is endeavoring to acquire, by purchase or condemnation, all the lands along said River within

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said territory, which may be necessary for its purposes, and it intends to erect at proper places on said River, and on its lands, such dams, reservoirs, power houses and other structures and machinery as may be necessary and proper for its purposes. And here this defendant sheweth to the Court that it has two dam sites on the said river where it owns the lands on both sides, and which are apparently feasible, and that for some time it has been engaged in testing with core drills the character of the river bed and of the foundation on either side of the river, all of which is necessary to a determination of the question of the feasibility of said dam site, and these works have been going on for some weeks, and up to this time

discloses the fact that the said dam site being now exploited is an excellent one, and it intends to begin at once the construction of a modern dam of approved pattern just as soon as it can be determined that the said site is a feasible one. Whereas, the Carolina-Tennessee Power Company does not own but one place on the Hiawassee River where it would be apparently possible to construct a dam, and at this point it cannot build a dam of greater height than eight feet or thereabout without ponding water upon the lands of this defendant which it acquired and holds for its purposes; and defendant says that a dam of this height would furnish so little power in proportion to its cost as to make this dam site altogether non-feasible and render it improbable *than* any person or corporation of business sense would undertake its construction.

6.

Answering the 6th paragraph of said complaint, this defendant admits that the said Hugh Van Deventer has known for more than two years that the Carolina-Tennessee Power Company had a charter, but it denies that he had any knowledge of its plans and purposes from any marks on the ground or from any survey deposited in the office of the Clerk of the Superior Court of Cherokee County, or from any other source; but on the contrary this defendant sheweth that every action of the Carolina-Tennessee Power Company within the last two years would lead, not only the said Van Deventer but every one else, to conclude that the Carolina-Tennessee Power Company did not intend to do anything looking to the carrying out of the purposes and plans for which it was incorporated. In the year 1911, the said Carolina-Tennessee Power Company was not pretending to do anything at all, and toward the fall of said year one E. B. Norvell, who had been counsel for the said Carolina-Tennessee Power Company since its incorporation, began an action in the Superior Court of Cherokee County to put the said corporation into the hands of a receiver and wind up its affairs. In the complaint of this action, it was alleged, among other things, as this defendant is informed and believes, that the Carolina-Tennessee Power Company had never bona fide intended to construct any dams, power plants, or do anything else for which it was chartered; that it was a speculative venture pure and simple; that the real purpose of its promoters was to make surveys, require a few isolated tracts abutting on the Hiawassee River; and when this had been done to sell out to some concern who might have the means and purpose to carry out the purposes for which the corporation was chartered; that the said corporation was wholly insolvent and had never been otherwise; that it had issued a large number of bonds which had no proper basis of value, and that this act constituted and was a fraud upon the public; and this action was pending for some time and the same was in some way compromised when one Powellson, whom this defendant charges to be a representative or agent of the water power trust, appeared upon the scene, satisfied the claim of the plaintiffs in some way, and withdrew from the files

17 of the Superior Court the complaint in said action. Both prior to the beginning of said action and since different persons have approached the said Van Deventer urging him to buy out the so-called Carolina-Tennessee Power Company; and these things, instead of putting the said Van Deventer upon notice that the Carolina-Tennessee Power Company honestly intended to carry out the purposes for which it was created, led him to conclude that the same would fall through or be held by the so-called "water power trust" and used by it as it had theretofore been used as a means of keeping other corporations out of the field of the said "water power trust." Defendant alleges that it was incorporated in good faith for the purposes of supplying electric current to the public, and it avers that it intends to carry out every purpose of its charter, and will do it unless prevented by the unlawful and unwarranted interference of the Carolina-Tennessee Power Company. It has done nothing in bad faith and has not intended to interfere with any vested right or lawful plan or purpose of the plaintiff and denies that the plaintiff has any lawful purposes or plans.

This defendant denies that the plaintiff intends to appropriate and use the waters of the Hiawassee River and the lands bordering thereon between the mouth of Cane Creek and a point about 2000 feet above the mouth of Nottley River and 3000 feet up the Nottley River for the development of water power and the generation of electric current, and the construction of works therefor, and the sale of such current to the public for light, power and other purposes; and this defendant repeats that it does not believe that the plaintiff intends to use any of the land for any legitimate purposes whatsoever. This defendant denies that the plaintiff has any rights in respect to any of said lands which are superior to the rights of this defendant. And especially does this defendant deny that this plaintiff intends in good faith to acquire by purchase or condemnation all lands 18 necessary for its works which it has not already acquired, including the lands which the defendant has purchased or taken contracts or options to purchase, and the lands which the defendant has commenced actions to condemn, and this latter the defendant is advised and believes the plaintiff cannot do for the reason that they form a part of its water power scheme and are not therefore, under the laws of the State of North Carolina, subject to condemnation. The defendant denies that if it be permitted to acquire or use the lands necessary for its works or to commence and prosecute actions for the condemnation thereof, or the construction of dams, reservoirs, power houses or other structures, upon said lands, that the same would cause any delay to the plaintiff in carrying out its plans, or that it would work any injury whatever for which plaintiff would have no adequate remedy at law.

Further answering the said complaint, and by way of statement of a cause of action for affirmative relief, this defendant sheweth that something like a year or more ago one Hugh F. Van Deventer, representing the parties who contemplated organizing the Hiawassee River Power Company, came into the County of Cherokee with a view of examining the situation along the Hiawassee River, and determining whether it would be feasible and advisable to construct

one or more power dams on said stream in said County; when said Van Deventer looked over the situation he found that in the year 1909, a corporation known as the Carolina-Tennessee Power Company had been chartered by the Legislature of the State of North Carolina, and upon inquiry he learned that some surveys had been made along the river, and a few isolated tracts of land had been bought by said corporation, and options for the purchase of other lands had been taken by it, and some suits for the condemnation of

- 19 other lands had been executed before the Clerk of the Superior Court of Cherokee County, one of which had been removed to the Federal Court; that the said Carolina-Tennessee Power Company allowed nearly, if not all of its said options to expire without exercising its right to purchase the lands covered thereby; that its condemnation suits had been allowed to drag and were not being prosecuted, and the parties who had theretofore given options to said Carolina-Tennessee Power Company were anxious to sell, and did try to sell, their lands to the said Van Deventer for the said Hiawassee River Power Company; and it was generally understood that the Carolina-Tennessee Power Company had fallen down and was insolvent, and different ones interested in it came to said Van Deventer and insisted that he try to buy out the holdings of said Carolina-Tennessee Power Company, and accordingly said Van Deventer did make appointments with the officers and representatives of said Carolina-Tennessee Power Company for the purpose of conferring with them about the purchase of its interest in the lands it had already bought, but nothing ever came of these transactions. And while said Van Deventer was engaged in acquiring lands along the said river for the purpose of the Hiawassee River Power Company, a suit was begun in the Superior Court of Cherokee County by one E. B. Norvell, having for its object the appointment of a receiver for the said Carolina-Tennessee Power Company and the winding up of its affairs. And in said suit it was alleged, among other things, that said Company was insolvent and had always been so; that it did not intend, and had never intended, bona fide to carry out the purposes for which it had been incorporated, but that the same had always been a speculative venture, the charter having been obtained and the few lands owned by it acquired with the view and purpose of selling out to some concern that might be able to carry out its purposes, along with its franchise, at a profit;
- 20 that said corporation had issued a large number of bonds to an amount greatly in excess of any real value of property owned by it, and that this was a fraudulent act calculated and intended to deceive the public; and upon this complaint a receiver was appointed for said company; and when the matter came on to be heard some sort of compromise or adjustment with the complaining creditor was made and he was paid a sum of money, and the complaint and other papers in the cause were withdrawn from the files of this court, and this defendant is advised and believes all this would appear from the complaint and other papers in the said cause if the same could be had; and this defendant challenges the plaintiff to restore the complaint and other papers to the files of this court or produce the same on the trial of this action. And finding things in

this situation this defendant says that its agent and representative, the said Hugh F. Van Deventer, was well warranted in believing, and did believe, that the said Carolina-Tennessee Power Company did not intend bona fide and honestly to carry out the purposes for which it had been chartered, but that it would sell out as soon as it could what small land holdings it had. And the owners and representatives of the Carolina-Tennessee Power Company knew all the while of the operations of the said Hugh F. Van Deventer, and at that time made no effort to interfere with him further than tell certain parties from whom he was endeavoring to buy lands abutting on the Hiawassee River that he was not offering them a price anything like sufficient and advised such land owners to exact higher prices than they otherwise would have been willing to take; said Van Deventer discovered that some time before he came into the field, one Browning, claiming to represent a party of capitalists, appeared in the County and set about making efforts to acquire certain lands situated along the Hiawassee River for the purposes of a Company

21 to be chartered by them, of the like character of this defendant, and when said Browning began to be active the Carolina-Tennessee Power Company suddenly became active too, and by every means in its power, hindered and annoyed the said Browning and interfered with him until the parties represented by him became discouraged and quit in disgust, when said Carolina-Tennessee Power Company again relapsed into a state of inactivity and so remained until hereinafter set forth; that during all of this time said Carolina-Tennessee Power Company did nothing whatever in the way of works; it made no explorations or investigations looking to the ascertainment of whether it possessed any suitable site for a dam which was absolutely necessary for its purposes, and did nothing else beyond what has herein been set out, and has done nothing else until the organization of this defendant and the commencement by it of active operations. And this defendant is advised and believes that it was well warranted in entering the field at the time and in the manner that it did, and that it had the right to acquire dam sites and all necessary lands for the purpose of ponding water for the generation of electric power for the public.

(2) Finding the situation as above set out, the Hiawassee River Power Company was duly created and organized under and by virtue of the laws of the State of North Carolina on the 13th day of July, 1914, and soon thereafter, having been unable, after repeated efforts, to agree with the owners upon a price, it instituted a proceeding to condemn all of the lands needed by it for its purposes, belonging to Alvin Farrow, or Dick Fowler, lying along said Hiawassee River for something like five miles; and soon thereafter the Carolina-Tennessee Power Company, devising, contriving and intending to hinder and delay this defendant in its operations, and to vex, harrass and annoy it as much as possible through one Hickey, who claimed that he wanted it for the purpose of a sheep ranch, made some sort of

22 a pretended purchase of the lands of the said Farrow or Fowler at and for the alleged price of Fifteen Thousand (\$15,000.00) Dollars and took a deed therefor, and this amount was deposited in the Bank of Murphy, where, this defendant is informed

and believes, the same still is, with some sort of a secret understanding and agreement between the said Farrow or Fowler and the said Carolina-Tennessee Power Company that said money is to be turned over when and as soon as said condemnation proceedings shall have been ended; and said Hiawassee River Power Company began another condemnation suit or proceeding against one John Green, having been unable to agree with him upon a fair price for the same, in which it seeks to take for its purposes, at a value to be fixed by appraisers appointed by law, such of his lands as would be necessary for its purposes; and soon after said condemnation proceedings had been begun, and at a time when the same constituted and were a legally sufficient notice of lis pendens, and with full notice and knowledge of what had been done, said Carolina-Tennessee Power Company made some sort of pretended purchase of the said land from the said John Green and took a pretended deed therefor from said Green, and undertook to secure to him the greater part of the purchase price by a deed of trust on the said land; and the counsel of the Carolina-Tennessee Power Company filed the answer of the said Green in the said condemnation proceeding, in which, among other things, it is claimed that he had sold the said lands to the said Carolina-Tennessee Power Company before the commencement of said condemnation proceeding when said Green well knows that several years ago he had given the Carolina-Tennessee Power Company an option to purchase the said land which it had refused to take advantage of, but had allowed it to lapse, and so Green had

thereafter treated it as having lapsed and had given an option
23 on the same land to L. E. Mauney, and also a later one to J. P. McMullen who was an agent of this defendant; and it is not true, as the said Green well knew and as the Carolina-Tennessee Power Company well knew, that the pretended deed which it took from the said *deed* had been executed with compliance with the said option which had long ago expired as the records show and when his said lands were a proper subject of condemnation at the time condemnation proceedings were begun by this defendant. And this defendant also began a condemnation proceeding against one J. M. Martin, and although there had been no pretended purchase from him by the Carolina-Tennessee Power Company, said proceeding is being defended by the counsel of the Carolina-Tennessee Power Company who set up an old option which he had given them and which had long ago expired, as he and said Carolina-Tennessee Power Company well knew, and said Martin, after its expiration, had given options to others and made repeated efforts to sell others, and said claim was not made bona fide, but simply for the purpose of harassing and annoying this defendant.

(3) That all the contracts to convey land held by said Van Deventer and all lands to which he had taken title for the Hiawassee River Power Company, as its promoter, were by said H. F. Van Deventer turned over by him and conveyed by him to the said Hiawassee River Power Company on the 14th day of July, 1914; and among said contracts to purchase was one for the purchase of a certain tract of land on the Hiawassee River owned by one Bud Mashburn, under

which contract said Mashburn had been paid all of the agreed purchase price except one payment which is not yet due, and this defendant expects to make this payment promptly when it does become due; and this contract to convey this land was duly put to record in the office of the Register of Deeds in Cherokee County; and while the Carolina-Tennessee Power Company had full notice of the rights of this defendant under this contract to convey, its representative went to the said Martin and urged him to accept the amount due from this defendant from them and convey the lands embraced in his contract to the Carolina-Tennessee Power Company in utter violation of the terms of his said contract with this defendant and in utter disregard of this defendant's rights as well; and this they did in a further effort to embarrass, hinder delay and interfere with this defendant in the prosecution of its purposes and plans.

(4) That notwithstanding the law of North Carolina required corporation or their charter is subject to become forfeited at the suit for which it was chartered within two years from the date of its incorporation or their charter is subject to become forfeited at the suit of the Attorney General, said Carolina-Tennessee Power Company has had a sort of existence for now nearly six years and has done absolutely nothing outside of making surveys and taking title to a few isolated tracts of land; it has not determined and does not know whether it has a feasible site for a dam across the Hiawassee River, and the only place where a dam could possibly be put is at a point where a dam only of the height of eight (8) feet could be erected without interfering with the covering the lands of this defendant which it holds and intends to develop for the purpose of its charter and this defendant says that it is advised and believes that a dam of such a height would generate so small a quantity of power as to render the cost of construction prohibitive.

(5) This defendant alleges that it was incorporated bona fide and that it honestly intends to carry out all the purposes for which it was incorporated and to serve the public as it may be allowed to do so with electric power, and it will do so unless prevented by the machinations and hindrances of the plaintiff on this account. It has already begun work some weeks ago at a point on the Hiawassee River near the mouth of Shoal Creek, in clearing off a site for one of the dams which it proposes to construct; that a core drill has been set up and has been for a long time operated and is being operated for the purpose of determining the character of the foundation and the feasibility of the site as a proper one for such dam as it proposes to build, across the river as well as on either side, and this work is approaching completion, and the President of the Hiawassee River Power Company has been duly authorized to close with B. H. Hardaway of Atlanta, Ga., a well known and responsible contractor, a contract for the erection of a dam, the work to commence just as soon as it shall have been determined that the proposed site is a suitable one; that this defendant says it is advised and believes that it ought not to be subjected to this repeated annoyance and vexatious interference of the plaintiff which constitute and are an irreparable injury in their consequences.

(6) That one Powellson appeared on the scene about the time the suit for the receivership for the Carolina-Tennessee Power Company was compromised; and he now represents himself to be the President of the Carolina-Tennessee Power Company and verifies the complaint in this action as such; said Powellson is, as this defendant is informed and believes, an agent and tool of the corporation known as the "water power trust" which now has contracts for supplying Knoxville and other cities within reach of the power plant which this defendant proposes to erect, which contracts are about to expire; and this defendant avers and charges the fact to be that all these interferences and annoyances proceed from a desire and purpose to keep corporations which might be rivals or competitors with said "water power trust" out of the field and leave it with

26 a practical monopoly, thereby enabling it to charge the public such prices as it may see fit, or as it may be able to induce a corporation commission to permit it to charge; and all these acts this defendant says are oppressive and illegal and ought not to be permitted to equity and good conscience, and are done in bad faith which actuates the plaintiff in this action.

(7) Finally this defendant alleges that there is every reason to believe that the Carolina-Tennessee Power Company does not intend bona fide to carry out the purposes for which it was chartered; that it has induced this defendant reasonably to believe that it had abandoned any such purpose indeed if — every had any such, and this defendant is advised and believes that having done this it ought not in equity and good conscience to be allowed thus wantonly and maliciously to interfere with, harass and annoy this defendant to its irreparable damage.

Wherefore, this defendant demands judgment that the plaintiff take nothing by its action; that the plaintiff be restrained and enjoined from the further interference with this defendant with the carrying out of its purposes and plans, and from doing any act which would amount to such interference or annoyance; and for such other and further relief as the defendant may be entitled to.

(Signed)

DILLARD & HILL,
ZEBULON WEAVER,
Attorneys for Defendant.

NORTH CAROLINA,
Cherokee County:

P. E. Nelson, being duly sworn, says that he is one of the officers of the Hiawassee River Power Company, to-wit: its Secretary and a Director thereof, that he has read the foregoing answer; that the same is true to his knowledge except as to matters and things

27 therein stated on information and belief, and as to such he believes it to be true.

(Signed)

P. E. NELSON.

Subscribed and sworn to before me, this November 13th, 1914.
(Signed)

J. E. KEENER,
Deputy Clerk Superior Court.

Filed the 13th day of November, 1914. A. A. Fain, Clerk Superior Court. Z. J. E. Keener, Deputy Clerk.

Reply of Carolina-Tennessee Power Company.

NORTH CAROLINA,
Cherokee County:

In the Superior Court.

(Title of Cause.)

The plaintiff, replying to that portion of the defendant's answer following the cause set out in paragraph six, to-wit: "Further answering the said complaint and by way of statement of cause of action for affirmative relief, the defendant sheweth, etc., says:

I.

That upon information and belief it denies the allegations contained in said paragraph concerning the information which the defendant alleges one Van Deventer, who is mentioned in the answer, obtained concerning the transactions, dealings, status and purposes of the Carolina-Tennessee Power Company; that it denies
28 that the defendant learned that the plaintiff was anxious to sell or had ever tried to sell any of its property and denies that it was understood that plaintiff company had fallen down or was insolvent, and denies that the said Van Deventer ever had any appointment with any officer of the plaintiff company who was authorized to sell or dispose of any of the plaintiff's property; that it denies the allegations contained in said paragraph concerning the suit brought by said E. B. Norvell against the plaintiff company, but admits said Norvell brought an action against said company, the nature of which appeared from the pleadings therein; and this plaintiff denies that said plaintiff Norvell in said action alleged that this plaintiff had never intended to carry out the purposes of its incorporation, and denies that said complaint alleged any fraud or intent to deceive the public. And the plaintiff denies upon information and belief, that said Van Deventer believed that the Carolina-Tennessee Power Company did not intend bona fide and honestly to carry out the purposes for which it was incorporated, and denies that the plaintiff or any of its officers or agents at any time endeavored unlawfully or wrongfully to interfere with or obstruct the defendant in any of its operations and denies that it endeavored to prevent the said Van Deventer from purchasing lands on Hiawassee River by inducing land owners to exact unreasonable prices therefor, or by any wrongful or unlawful means, and this plaintiff denies that it wrongfully interfered with one Browning who is mentioned in said answer of the defendant, and denies that it at any time relapsed into a state of inactivity, but alleges that at all times since its organ-

ization it has been its bona fide purpose and intent to construct the works and use the property mentioned in the complaint in this cause.

II.

29 That the allegations contained in paragraph two of the defendant's further answer to the effect that the defendant "after repeated efforts so to do was unable to agree with Alvin Farrow or Dick Fowler," mentioned in said answer, as to the purchase price of his property are untrue; the plaintiff denies that it had any unlawful, improper intent or any purpose or intent to delay the defendant in purchasing the property of said Dick Fowler, but alleges that it purchased the same in good faith for full value, for the purpose of developing its water powers, and paid the sum of Fifteen Thousand Dollars therefor, in cash, and took a deed therefor and now holds the same for its own use and purpose. And the plaintiff denies that it purchased the land of said Green, mentioned in said paragraph of the answer, with any unlawful or wrongful purpose, or with the intent or unlawfully and wrongfully injuring the said defendant, but alleges that it purchased said land in good faith for the purpose of developing its water power and for full value, and paying and agreeing to pay therefor the amount which the said Green had previously agreed to take for the same. And this plaintiff denies that it has acted in bad faith concerning the land of said J. M. Martin, mentioned in said paragraph of the answer.

III.

That it has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph three of said defendant's further answer, except so much thereof as alleges that the plaintiff had full notice of the rights of the defendant, and as to this the plaintiff expressly denies the same. And it expressly denies that it did anything in regard to the lands therein mentioned for the purpose of wrongfully embarrassing, hindering or delaying the said defendant.

30

IV.

That the allegations of fact set out in paragraph four of said further answer of the defendant are denied.

V.

That the plaintiff denies it has any knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in said paragraph five of said further answer.

VI.

Replying to paragraph six of said defendant's answer, the plaintiff says that W. V. M. Powellson is the president of the plaintiff

Company, and is largely interested in its business, and plaintiff denies that said Powellson is an agent or tool or in any manner connected with the corporation referred to in defendant's answer as the "water power trust," and denies that the defendant had any knowledge, or knew of any facts or circumstances which in any way or manner justified the defendant in making such allegation in its answer in this cause, and this plaintiff expressly denies all of the other allegations contained in said paragraph six of said further answer.

VII.

It denies each and every allegation contained in paragraph seven of the defendant's further answer, and alleges that it employed engineers of national reputation to examine, survey and report upon the feasibility of developing the water power of said river and to design its works; that it adopted locations for two separate and distinct developments on said river, which developments contemplate for power purposes the use of the entire fall of the Hiawassee River from a point near the Tennessee State line to a point a short distance above the mouth of the Nottley River, as set forth in the complaint herein; that it has expended large sums of money in the purchase of 32 tracts of land which it owns in fee, aggregating more than 3200 acres situated along said river between said points; that it now owns in fee simple at said location more than 26.5 miles of river front and holds contracts covering — miles more of said river front; that in June 1911, it caused maps and surveys of its locations to be filed in the office of the Clerk of the Superior Court of Cherokee County, on which were listed the names of all persons whose lands would be required for said developments and the number of acres of each tract of land proposed to be acquired for the purpose of said developments, and showing all lands that would be overflowed by said dams; that it thereafter commenced actions in the Superior Court of Cherokee County to acquire lands by condemnation proceedings, as set out in the complaint herein, and has at all times since its organization, and does now, intend in good faith to develop the said water power property and make the same available for power purposes in accordance with the plans and surveys mentioned and referred to in the complaint in this cause; and in accordance with the original plans and purposes of the organization of this Company.

Wherefore, the plaintiff demands judgment as demanded in its original complaint.

E. B. NORVELL,

M. W. BELL,

MARTIN, ROLLINS & WRIGHT,

Attorneys for the Plaintiff.

STATE OF NORTH CAROLINA,
County of Cherokee:

W. V. N. Powellson, being first duly sworn, says that he is the President of the plaintiff Company; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated upon information and belief, as to which he believes it to be true.

W. V. N. POWELLSON.

Sworn to and subscribed before me this the 5th day of April, 1915.

[SEAL.]

L. E. BAYLESS,
Notary Public.

Amended Complaint.

NORTH CAROLINA,
Cherokee County:

Superior Court.

(Title of Cause.)

The plaintiff for its amended complaint, which is to be used as an affidavit for injunctive relief, says on information and belief.

1. That the plaintiff is a corporation duly organized and existing under and by virtue of a Special Act of the General Assembly of North Carolina, passed and ratified the 16th day of February, 1909. The objects for which the plaintiff was established are, among others, to supply light, heat and power, electrical, steam or otherwise, to individuals and corporations, private or municipal.

2. The said Special Act of the General Assembly of North Carolina contained among others the following provisions:

Sec. 6. That said corporation shall have the following power.

(a) To supply to the public, including both individuals and corporations, whether private or municipal within the State of North Carolina and elsewhere, power in the form of electric current, hydraulic, pneumatic and steam pressure, or any of the said forms, or in any other form, for use in driving machinery, and for light, heat, and all other uses to which the power so supplied can be applied, and to fix, charge, collect and receive payment therefor; and for the purpose of enabling the company to supply power as aforesaid, the company is authorized and empowered to erect, build and maintain any dams, flume or flumes, ditch or ditches, and to buy or otherwise acquire, generate, develop, store, use, transmit and distribute power of all kinds, and to locate, acquire, construct, equip, maintain and operate lines for the transmission of power by wires or poles, or underground, and by cables, pipes, tubes, conduits and all other convenient appliances for power transmission, including rail-

roads or railways, with such connecting and branch lines within the State of North Carolina or elsewhere as the board of directors may locate or authorize to be located, for receiving, transmitting and distributing power, and to acquire, own, hold, sell or otherwise dispose of water power and water privileges in the State of North Carolina, and locate, acquire, construct, equip, maintain and operate all necessary plants for generating and developing by water, steam or by any other means, and for storing, using, transmitting, distributing, selling and delivering power, including dams, gates, bridges, sluices, tunnels, stations and other buildings, and all other works, structures, machinery and appliances which may be necessary to the operation of said plants: Provided, that the lines and appurtenances hereinbefore authorized for distributing power and light, are to be constructed, when on public streets or highways of any county, city or town under such reasonable regulations as the authorities respectively thereof shall, upon application from the company prescribe.

34 (b) To acquire by purchase, condemnation or other proper method, the right to use, employ and divert the water flowing and running in any stream or water courses, not navigable, in North Carolina, which may be necessary to the exercise of any of the powers of a public or quasi public character herein granted to the said corporation; and whenever it shall be necessary to divert the water from any such stream or water course to be used for any of the purposes herein provided, the said corporation shall have the right to have the value of the said water so to be diverted, and the land so to be used over which it shall be banked, ponded or conducted, condemned, and the value thereof assessed in the manner hereinafter provided for the condemnation and valuation of the land and other property.

Sec. 6. That said corporation shall have power and authority to construct and maintain dams across any stream or streams in North Carolina not declared by law to be navigable, at any point or points, place or places on land, now owned or hereafter acquired by it in North Carolina or elsewhere by purchase or by condemnation in the manner hereinafter prescribed, and acquire land and water by purchase or condemnation, or other lawful method, for the purpose of building dams, ponding and storing water to be used either as a water supply, or as a motive power, for any railroad or railway, or street railway or motor line, for machinery, power plant, factor, or other business the said Company may desire to operate, or to supply water or power to individuals or corporations, and of producing power by means of any such dam or dams for sale, and of selling the same, and to that end and for any other purpose, it may install, use and operate any and all machinery considered desirable and necessary. This section shall be considered and construed to authorize the manufacture of electricity or other power with the water power produced by means of such dams, and the selling of such electricity or power, and the right to transmit the same to consumer by wires, poles, cables and conduits, or any other approved method of transmission, and the right to condemn land and water for

such purposes; also said power may be used by said Company for propelling or running its railroads, railways or street railways, or motor lines, and telephone or telegraph lines, and boats or for any other purpose.

Sec. 8. It shall be lawful for the president and directors, their agents, superintendents, engineers or others in their employ, to enter at all times upon all lands or water for the purpose of exploring or surveying the lands and water required by said company for the location of any of its works, or for the conducting of the business or any part of said business, hereinbefore authorized, in paragraphs *a, b, c* and *d* of section five, and of locating said works, doing no unnecessary damage to private property; and when the location of said work shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the County in which the said land lies, then it shall be lawful for the said company by its officers, agents, engineers, superintendents, contractors and others in its employ, to enter upon, take possession of, have, hold, use and excavate and fill in such lands, and to erect all the necessary and suitable structures for the erection, completion, repairing and operating of said works, subject to such compensation as is hereinafter provided; provided, however, that said company shall not enter upon or break ground upon the premises, except for the purposes of surveying, without the consent of the owner, until such owner's damages are agreed upon between such owner and said company, or ascertained by the method hereinafter provided and such damages have been paid to such owner; and provided further, that such locating of its works and filing its surveys in the office of the

Clerk of the Superior Court shall not preclude said company
36 from making, from time to time, other location of works and filing surveys of the same as its business and its development require; and whenever any land for the location of a dam or dams, lake or lakes, or a canal or canals, or for ponding water, or any other lands or rights-of-way may be required by said company for the purpose of constructing and operating its railroads or railways, street railways or motor lines, telegraph or telephone lines or other works, or for the conducting of the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company at a valuation of three commissioners, or a majority of them, to be appointed by the Clerk of the Superior Court of the County in which the land to be condemned lies or the Clerk of the adjoining County if the land lies in more than one county.

3. During the year 1909, and at other times thereafter, but prior to the commencement of this action, officers, engineers and other representatives of the plaintiff entered upon, explored and surveyed the lands bordering on the water in the Hiawassee River, a stream in Cherokee County, in North Carolina, not declared by law to be navigable, and during said year 1909 and at other times thereafter, but prior to the commencement of this action, the plaintiff defined and adopted, by action of its Board of Directors, the location of works

for the development of water power and generation of electricity, consisting of dams, reservoirs, flumes, power plants, and other structures, and caused to be marked upon the ground the location of said works and the lands necessary therefor. The location of said works extends up and along the banks of the Hiawassee River from a point about five hundred feet above the mouth of Cane Creek and the spiral of the Louisville and Nashville Railroad Company near

37 the Tennessee State line to a point about two thousand feet above the mouth of the Nottley River, and for about three thousand feet up the Nottley River. During said year 1909 and thereafter, and principally during the year 1910, the plaintiff acquired by purchase a large portion and substantially one-half in area of the lands necessary for the said works. In or about June, 1911, the plaintiff deposited in the office of the Clerk of the Superior Court of Cherokee County a survey of said works showing the location thereof and the lands necessary therefor, which said survey is referred to and made a part of this complaint, and thereafter the plaintiff commenced actions to acquire by condemnation certain lands necessary for said works, the plaintiff being unable to agree with the owners for the purchase thereof, which said actions are still pending. The plaintiff has also conducted negotiations and entered into contracts or options for the purchase of other lands necessary for said works.

4. The plaintiff has been at all times since its incorporation, and is still, actively engaged in carrying out its plans for the development of the water power of the Hiawassee River, the purchase or condemnation of the necessary lands therefor, and the construction of works for the generation of electric current for sale to the public for light, power and other purposes.

5. The defendant is a corporation organized under the General Law of North Carolina, on the 13th day of July, 1914, for the alleged purpose, among other things, of supplying to the public electric current for light, power and other purposes and developing the water power of the Hiawassee River in the County of Cherokee for the purpose of generating electric current. Immediately after its incorporation the defendant acquired from one Hugh Van Deventer certain lands and contracts or options for the purchase of certain

38 other lands upon and along the banks of the Hiawassee River between the Tennessee State line and the junction of the Nottley River, and commenced actions for the purpose of condemning certain other lands on said river between the said State line and the junction of the Nottley River, all of which lands are necessary for the works of the plaintiff, as shown by marks upon the ground, and the survey thereof deposited by the plaintiff in the office of the Clerk of the Superior Court of Cherokee County in June, 1911. The defendant threatens to acquire and is attempting to acquire, by purchase or condemnation, other lands upon and along the banks of the Hiawassee River, which are necessary for the works of the plaintiff, and also threatens to place upon said lands, dams, reservoirs, power houses and other structures and machinery. The use of

the said lands by the defendants is inconsistent with the use thereof by the plaintiff for the purposes above stated.

6. Said Hugh Van Deventer has for more than two years, and the defendant has at all times since its incorporation, had knowledge of the plans and purposes of the plaintiff with the respect to the development of the water power on the Hiawassee River and the location of the works of the plaintiff as marked upon the ground, and shown by the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County. The acts of the defendant as above set forth have interfered, and if continued will still further interfere with the rights of the plaintiff and the development and completion of its said plans and purposes. The defendant has not been incorporated in good faith for the purpose of supplying electric current to the public, but has been incorporated in bad faith, and for the unlawful purpose of interfering with the vested rights and lawful plans and purposes of the plaintiff. The defendant did not prior to the commencement of this action define or mark any location for any works on the Hiawassee River and did not prior to the commencement of this action adopt any such location by action of its board of directors or otherwise.

7. The plaintiff intends to appropriate and use the waters of the Hiawassee River, and the lands bordering thereon between said point about five hundred feet above the mouth of the Cane Creek and said point about two thousand feet above the mouth of the Nottley River, and for about three thousand feet up the Nottley River, for the development of water power and the generation of electric current and the construction of works therefor, and the sale of such current to the public for light, power and other purposes. Such use of the said waters and lands is a public use. The rights of the plaintiff with respect to said water and lands for such purposes are prior and superior to any rights of the defendant with respect thereto. The plaintiff intends in good faith to acquire, by purchase or condemnation, all lands necessary for said works which it has not already acquired, including the lands which the defendant has purchased or taken contracts or options to purchase, and the lands which the defendant has commenced actions to condemn.

8. If the defendant is permitted to acquire or use any of the lands necessary for the works of the plaintiff or to commence or prosecute actions for the condemnations of any thereof, or to construct upon such lands any dams, reservoirs, power houses or other structures, the plaintiff will be greatly annoyed and delayed in carrying out its plans and will suffer irreparable injury, for which there is now no adequate remedy at law.

Wherefore, the plaintiff prays for an injunction perpetually restraining the defendant, its officers, agents, servants and employees from

(1) Purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works of the plaintiff as shown by marks upon the ground, or the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County;

(2) Prosecuting any actions heretofore commenced for the condemnation of any such lands, or commencing hereafter any actions for the condemnation of any thereof;

(3) Entering upon or constructing or placing any dams, reservoirs, power houses or other structures or machinery upon any such land; and

(4) Doing or committing acts or things which would interfere with the rights of the plaintiff, or the prosecution or completion of its plans and purposes as herein set forth, or which would annoy, delay or harrass the plaintiff in carrying out such plans and purposes.

And further prays for a temporary injunction restraining the defendant from doing or committing any of such acts or things during the pendency of this action.

And further prays for such other and further relief as may be just and proper in the premises.

(Signed) M. W. BELL,
MARTIN, ROLLINS & WRIGHT,
Attorneys for Plaintiff.

STATE OF NEW YORK,
County of New York, ss:

Wilfred V. N. Powellson, being duly sworn, says: That he is the President of the Carolina-Tennessee Power Company, the plaintiff herein; that he has read the foregoing amended complaint; that the same is true of his own knowledge, except as to the matters and things therein set forth on information and belief, and as to those matters he believes it to be true.

(Signed) WILFRED V. N. POWELLSON.

41 Subscribed and sworn to before me this 16 day of June, 1916.

(Signed) HARRY M. DURNING,
[N. P. SEAL.] *Notary Public, Bronx County, N. Y.*

Filed 6-27-1916. A. A. Fain, C. S. C., by H. A. Fain, D. C. S. C.

Amended Answer.

NORTH CAROLINA,
Cherokee County:

CAROLINA-TENNESSEE POWER COMPANY

vs.

HIAWASSEE RIVER POWER COMPANY.

The defendant by leave of the Court further answering the complaint filed herein, and as an amendment to the answer heretofore filed, alleges:

1. That the defendant is a corporation duly chartered and organized under the laws of the State of North Carolina, by virtue of a

charter issued by the Secretary of State on July 13th, 1914, which said charter is duly recorded in the office of the Clerk of the Superior Court of Cherokee County, to which reference is hereby made as a part of this answer.

2. That the provisions of said charter, the terms of which were duly accepted by the defendant, confer upon the defendant, among other things, the following powers, to-wit:

(a) The location of a principal office at Murphy, North Carolina.

42 (b) To supply to the public power in the form of electric current for use in driving machinery and for light, heat and all other uses to which power can be applied, and to fix charges and collect payment therefor.

(c) For the purpose of supplying such power, to buy or otherwise acquire, generate, develop, store, transmit and distribute power of all kinds.

(d) To locate, acquire, construct, equip, maintain and operate a plant or plants with all necessary dams, waterways, sluices, buildings, structures, machinery and instrumentalities whatsoever useful and necessary in connection therewith on the Hiawassee River in the State of North Carolina.

(e) To transmit the power so obtained and to establish lines for such transmission.

(f) To acquire water power and privileges and erect dams, gates, bridges, sluices, tunnels, stations, buildings, and machinery in connection therewith.

(g) To carry on the business of generating, making, furnishing and selling electricity for the purpose of light, heat and power.

(h) To purchase, own, hold and acquire, whether by gift, purchase or condemnation, any and all lands and leases of real estate and to construct all necessary dams, power houses and structures, to flood and back water, and to install machinery and apparatus necessary in connection with its business.

(i) To condemn all necessary lands and rights in land of whatever nature, as provided in Chapter 1 of the Revisal of North Carolina of 1905, and under Chapter 32 of said Revisal, and all amendments thereto.

(j) To do any and all other things necessary and proper in connection with its business.

3. That the defendant on July 14th, 1914, duly accepted said charter and all the terms thereof and became duly and properly incorporated thereunder and actively entered upon the performance of the matters and things contemplated by said charter, including the right therein granted to build and construct its dams and power houses upon the Hiawassee River near said Town of Murphy, in Cherokee County, as expressly allowed and permitted by said charter, and duly adopted the location of its proposed works, including the construction and maintenance of said dams and power houses on said river at two certain points thereon known as Shoal Creek dam site and Coleman dam site, as shown by the surveys theretofore made and reported to said corporation, herein after more fully referred to.

4. That prior to the incorporation of the defendant company, one H. F. Van Deventer, acting as developer thereof, had conceived and put into actual operation the development of the water power of the Hiawassee River near the said town of Murphy; that said Van Deventer, prior to said July 14th, 1914, and with a view to the development of said river, and for the purpose of acquiring the necessary properties to be used and operated by the defendant corporation thereafter to be organized, and which was organized as this defendant, caused a thorough and proper investigation of said water power upon said river and an investigation of the lands adjacent thereto to be made and procured surveys thereof to be made by C. A. Chapman, an experienced surveyor and hydraulic engineer, of Chicago, showing the location of the proposed dams upon said river and the lands to be flooded thereby. Reports of these surveys made by Chapman showing the location of said dams upon said river, the lands to be flooded and all other matters necessary to be determined in the construction of a power plant, were furnished by said Chapman to said Van Deventer.

44 That said Van Deventer further caused a survey of the properties abutting upon the river above said dams which were to be flooded, to be made by one McClellan, which said survey showed the property lines of the respective owners of said properties upon both sides of said river, and said McClellan made reports thereof and maps and surveys and furnished the same to said Van Deventer.

That said Van Deventer, with a further view of securing all necessary data relative to the location of dams at Shoal Creek and Coleman dam sites on said river, in the spring of 1914 further employed C. O. Lenz, an hydraulic engineer of New York City, to examine and make a report upon the water power of the Hiawassee River at said Shoal Creek and Coleman dam sites near the town of Murphy, and said Lenz did make a report of said water power showing the location of said dam sites, the power to be generated by plants to be constructed at same, the lands that would be flooded thereby, together with all other necessary data, and furnished the same to said Van Deventer.

That all of said surveys showed the location of said dams at two definite dam sites, to-wit: Shoal Creek and the Coleman dam sites, together with the cost of construction and all other necessary data for said development as contemplated by the corporation to be thereafter formed and organized.

5. That after said investigation was begun by said Van Deventer, he began to acquire and did acquire by deeds and valid contracts from property owners a large portion of the lands necessary for the erection of dams at Shoal Creek and Coleman dam sites and for storing the waters backed by said dams, and caused said deeds and contracts to be recorded in the County of Cherokee.

6. That immediately upon the organization of the defendant corporation, the said Van Deventer conveyed to the defendant for the purpose of constructing said dams at the two said dam sites all the
45 lands embraced in said deeds and said contracts along the said river theretofore taken by him, and further sold, transferred

and turned over to said corporation all the surveys, maps and reports made by said engineers, all of which showed the definite location of said dam sites and all the data necessary for and relative to the development of the same, which said deeds and contracts, reports, maps and surveys were accepted by said corporation and the location of its said dams and works upon river, as shown by said reports and surveys, were duly adopted by the defendant by proper corporate action, and by such corporate action it located its said Shoal Creek dam site near the point where Shoal Creek flowed into the river, and its Coleman dam site between the Coleman and Mashburn lands below the mouth of Bear Paw Creek, both on the Hiawassee River near the Town of Murphy, said location being shown by said reports, maps and surveys of said engineers and surveyors.

7. That immediately after the incorporation of the defendant and the adoption of said reports, and the location of its proposed works upon the said River, to-wit, on or about the 15th day of July, 1914, the defendant in order to acquire further necessary lands, being unable to agree with the owners in regard thereto, instituted sundry condemnation proceedings before the Clerk of the Superior Court of Cherokee County, setting out therein the purposes for which the defendant was organized, and the necessity for the lands sought to be condemned for the construction of its said dams at the said Shoal Creek and Coleman sites.

8. That the defendant further began actively to enter upon the work necessary for the construction of its said proposed plant, authorized its President to enter into the proper contract immediately for the erection of the Shoal Creek dam; began the preparation for core drilling the foundations for said two dam sites, and
46 was otherwise actively prosecuting all of its said purposes and plants when this action was filed.

9. That the plaintiff Company procured a charter issued in the year 1909, but the defendant avers that after said charter was issued the plaintiff was utterly unable to carry on or perform the construction of any dams and power plants upon the Hiawassee River; that it acquired numerous options upon lands upon said River which it allowed to lapse and which it abandoned; that it did not pay the purchase price of said lands and has never had funds with which to build any proposed dams, if any had been properly located, which location the defendant denies; that it utterly failed in good faith to use any properties which it might have acquired within a reasonable time for any public purposes whatsoever; that it failed to make any completed locations of its said proposed plans; that it failed to adopt any such schemes as alleged in its complaint prior to the appropriation of the lands and dam sites acquired by the defendant and adopted by it as hereinbefore alleged; that the plaintiff failed to file the necessary maps in the office of the Clerk of the Superior Court, as provided by its charter; that at the time said Van Deventer was acquiring the properties purchased by him and conveyed to this defendant, there was no map whatsoever showing any proposed works or contemplated works of the plaintiff on file in the office of said Clerk; that there was no indication upon the ground by any actual work or otherwise of any contemplated development by the plaintiff.

but on the contrary defendant alleges that the plaintiff had utterly and entirely allowed any development it may ever have contemplated to lapse, and had abandoned the same, and during a large part of the time said plaintiff was actually in the hands of a Receiver, such Receiver having been appointed by one of its agents and directors upon the ground that plaintiff was insolvent and absolutely unable to pay off any of its indebtedness and had suspended its ordinary business for want of funds to carry on the same, all of which facts were generally known, were known to the defendant Van Deventer and the defendant corporation.

That said plaintiff, notwithstanding its utter failure and inability for a period of nearly six years to begin an actual operation or to perform any of the objects allowed by its charter, began through its agents and employees, soon after defendant corporation was organized and entered upon the actual development of the water power upon said River, to interfere, impede, retard and harass the defendant and to prevent it from developing its water power upon said River and constructing its dams and plants.

10. Defendant alleges that on July 15th, 1914, it started a condemnation suit against Alvin Farrow or Dick Fowler and others, to condemn certain lands on the Hiawassee River to the development of defendant upon said river; that within a few days thereafter plaintiff bought or pretended to buy the said land sought to be condemned in an effort to interfere with, delay and hinder defendant in its said condemnation proceeding; all to the irreparable damage and injury of this defendant.

11. Defendant alleges that on July 17th, 1914, it started a condemnation suit against John Green, to condemn certain lands on the Hiawassee River necessary to the said development of defendant upon said river, and that within a few days thereafter plaintiff bought or pretended to buy the said land sought to be condemned and did this in an effort to interfere, delay and hinder defendant in its condemnation suit; all to the irreparable damage and injury of this defendant.

12. Defendant alleges that on July 17th, 1914, it started a condemnation proceeding against J. M. Martin to condemn certain lands on the Hiawassee River necessary to the said development of defendant upon said river, and that within a few days thereafter plaintiff started a condemnation suit against the said J. M. Martin for the same land, which condemnation was started in an effort by the plaintiff to interfere with, delay and hinder defendant in its said condemnation suit; all to the irreparable damage and injury of this defendant.

13. Defendant alleges that these actions relative to the Fowler land, the Green land and the Martin land were not in good faith on the part of the plaintiff, but were done solely to hinder and prevent defendant in its said development.

14. Defendant alleges that plaintiff has been buying or attempting to buy or obtain under contracts various lands along the Hiawassee River, and that such actions of the plaintiff were not in good faith, but were for the purpose of hindering, delaying and prevent-

ing defendant in its development upon said river; all to the irreparable damage and injury of this defendant.

15. Defendant alleges that the plaintiff has started condemnation suits against this defendant for certain lands owned by this defendant along the Hiawassee River, which lands were acquired by this defendant in the line of its said development and are necessary in its said development upon the Hiawassee River, and alleges that this condemnation suit is not in good faith, but is brought solely for the purpose of hindering, delaying and preventing defendant from accomplishing its said development; all to the irreparable damage and injury of this defendant.

16. Defendant alleges that if the plaintiff is permitted to continue its acts and doings as alleged in this answer relative to the lands along the Hiawassee River necessary to the development of the plans and purposes of this defendant upon said river, and especially if it is permitted to hinder, delay and prevent
49 defendant in its condemnation suits for lands along said river necessary for its purposes and if it continues to buy land along said River necessary for such development of defendant, and if it continues to prosecute its action for the condemnation of defendant's land, and if it is permitted to construct upon any lands which it now owns any dams, reservoirs, power houses or other structures, the defendant will be greatly annoyed and delayed and hindered and prevented in carrying out its plans and will suffer irreparable injury for which there is now no adequate remedy at law.

17. Defendant alleges that it has the sole right to the erection of dams and power houses upon said river and a prior right as against the plaintiff to such development, and that plaintiff should be enjoined and restrained from doing any of the acts or things alleged in this answer as being done by it and should be enjoined from building any dam or power house or plant upon said river, and should be enjoined from interfering in any way with the plans of development of this defendant.

Wherefore, defendant prays for an injunction perpetually restraining the plaintiff, its officers, agents, servants and employees:

(1) From interfering in any manner with its named condemnation suits for land upon the said Hiawassee River.

(2) From proceeding with its alleged condemnation suit pending in this Court against this defendant for lands owned by this defendant upon the said Hiawassee River.

(3) From purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works and plans and development of the defendant upon said river.

(4) From prosecuting any actions commenced by it
50 for the condemnation of any lands upon said river, or commencing hereafter any actions for the condemnation of any land upon said river.

(5) From entering upon or constructing or placing any dam,

reservoirs, power houses or other structures or machinery upon said river or the lands adjacent thereto.

(6) From doing or committing any acts or things which will interfere with the rights of the defendant in the premises or the prosecution or completion by defendant of its development upon said river as herein described and set forth, or which will annoy, hinder, delay, prevent or harass the defendant from carrying out its plans and purposes relative to the development upon said river.

Defendant prays for such other and further relief as may be just and proper in the premises.

(Signed)

DILLARD & HILL,
E. R. BLACK,
J. N. MOODY,
ZEBULON WEAVER,
Attorneys for Defendant.

STATE OF TENNESSEE,

County of Knox:

H. F. Van Deventer, being duly sworn, says, that he is the President of the Hiawassee River Power Company, the defendant herein; that he has read the foregoing amended answer; that the same is true of his own knowledge, except as to the matters and things set forth on information and belief, and he believes such matters and things so set forth on information and belief to be true.

H. F. VAN DEVENTER.

Sworn to and subscribed before me this 19th day of June, 1916.

W. S. MILLER,

Notary Public, Knox County, Tennessee.

51 *Plaintiff's Answer to Defendant's Amended Answer.*

NORTH CAROLINA,

Cherokee County:

Superior Court.

(Title of Cause.)

The Carolina-Tennessee Power Company, replying to the defendant's amended answer filed herein, says:

1. That, as it is informed and believes, the allegations contained in paragraph one of said amended answer are true.

2. In reply to paragraph two of said amended answer, the plaintiff says that, as it is advised and believes, a substantial copy of the Certificate of Incorporation of the defendant is correctly set out in said paragraph two, but the plaintiff denies, upon information and belief, that the powers attempted to be conferred upon the defendant by said Certificate of Incorporation are valid, in so far as said

powers attempt to authorize the condemnation of water power properties, developed or undeveloped, situate in North Carolina.

3. That it denies that it has any knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph three of said amended answer.

4. That it denies that it has knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph four of said amended answer.

5. That it has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph five of said amended answer, except so much thereof as states that the said Van Deventer did acquire certain lands and enter into certain contracts concerning property situated on Hiawassee River.

6. That it denies that it has any knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in paragraph six of said amended answer, but admits that said Van Deventer did convey certain property to the defendant.

7. That the allegations contained in paragraph seven of said amended answer, are denied upon information and belief, but the plaintiff admits that the defendant did institute certain condemnation proceedings in Cherokee County on or about the 15th day of July, 1914.

8. That the allegations contained in paragraph eight of said amended answer are denied.

9. That each and every allegation contained in paragraph nine of said amended answer, which is inconsistent with, or in conflict with, the allegations contained in the plaintiff's complaint, are denied, but the other allegations contained therein are true.

And the plaintiff further alleges that the truth and the facts in regard to the matters and things mentioned and referred to in said paragraph of said amended answer are correctly set out in plaintiff's complaint.

And the plaintiff hereby denies that it has failed to carry out the objects of its incorporation, or that it is unable to do so, and denies that it has unlawfully or wrongfully interfered with, impeded, retarded or harassed the defendant in any way, but, on the contrary, alleges that the defendant, long after the plaintiff acquired rights in the property referred to in the pleadings in this cause, unlawfully, wrongfully and for the purpose of hindering and delaying the plaintiff, or for some other improper purpose, attempted to acquire,

and did acquire, certain property referred to, situated along the Hiawassee River, as set out in the original complaint and amended complaint filed herein.

10. That the allegations contained in paragraph ten of said amended answer are denied, but the plaintiff admits that the defendant did institute a condemnation proceeding against Alvin S. Farrow about the time mentioned in said amended answer.

11. That the allegations contained in paragraph 11 of said amended answer are denied, but the plaintiff admits the defendant

instituted a condemnation proceeding against John Green about the time mentioned in said amended answer.

12. That the allegations contained in paragraph twelve of said amended answer are denied, but the plaintiff admits that the defendant did, about the time mentioned in said answer, institute a condemnation proceeding against the said J. M. Martin.

13. That the allegations contained in paragraph thirteen are untrue in every respect and are denied.

14. That the allegations contained in paragraph fourteen of said amended answer are denied, but the plaintiff admits and alleges that it has bought large boundaries of land situated along the Hiawassee River for the purposes set out in the complaint and amended complaint filed herein.

15. That the allegations contained in paragraph fifteen of said amended answer are denied, except so much thereof as states that the plaintiff has started condemnation suits against the defendant for the lands along the Hiawassee River, and this is admitted.

16. That the allegations contained in paragraph sixteen of said amended answer are untrue and are denied.

17. That the allegations contained in paragraph seventeen of said amended answer are untrue and are denied.

(Signed)

MARTIN, ROLLINS & WRIGHT.

M. W. BELL.

54 STATE OF NEW YORK,
County of New York:

Wilfred V. N. Powellson, being duly sworn, says: That he is the President of the Carolina-Tennessee Power Company, and the plaintiff herein; that he has read the foregoing reply and knows its contents; that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to those matters and things he believes it to be true.

(Signed)

CAROLINA-TENNESSEE POWER CO.,

By W. V. N. POWELLSON, *President*.

Sworn to and subscribed before me this the 21st day of October, 1916.

[K. P. SEAL.]

(Signed)

HARRY M. DURNING,

Notary Public in and for New York County.

My commission expires March 30th, 1918.

Filed Oct. 26th, 1916. A. A. Fain, C. S. C. By H. A. Fain, D. C.

Issues.

NORTH CAROLINA,
Cherokee County:

Superior Court, April Term, 1917.

(Title of Cause.)

1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint, and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and

7-A? Answer "Yes," (by consent).

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2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant Company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer "Yes."

3. Did the plaintiff prior to the commencement of this action on the 21st day of August, 1914, abandon its said locations and proposed plans, as alleged in the answer? Answer "No."

4. Did the plaintiff file the maps or plats of its said locations in the office of the Clerk of the Superior Court of Cherokee County on or about June 21st, 1911, as alleged in the complaint? Answer "Yes."

5. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs and public works which had theretofore been made — marked out on the Hiawassee River, as alleged in the complaint? Answer "Yes" (by consent).

6. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer "Yes" (by consent).

7. If so, did the defendant thereafter by authoritative corporate action adopt said locations, and if so, when? Answer "No."

Judgment.

NORTH CAROLINA,
Cherokee County:

Superior Court, April Term, 1917.

(Title of Cause.)

The above entitled cause came on to be heard at the present
56 term of this court, and was heard before His Honor, W. J. Adams, Judge Presiding, and a jury, and the Court having submitted to the jury seven issues, which, with the answers of the jury thereto, were as follows, to-wit:

1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee

River in the year 1909, as alleged in the complaint, and as indicated on the maps offered in evidence by the plaintiff and marked Exhibits 7 and 7-A? Answer "Yes" (by consent).

2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant Company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer "Yes."

3. Did the plaintiff, prior to the commencement of this action on the 21st day of August, 1914, abandon its said locations and proposed plans, as alleged in the answer? Answer: "No."

4. Did the plaintiff file the maps or plats of its said locations in the office of the Clerk of the Superior Court of Cherokee County on or about the 21st day of June, 1911, as alleged in the complaint? Answer: "Yes."

5. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs and public works which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint? Answer: "Yes" (by consent).

6. Were the locations for the dams, reservoirs and public works claimed by the defendant, surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer: "Yes" (by consent).

7. If so, did the defendant thereafter by authoritative corporate action adopt said locations, and if so, when? Answer: "No."

It is now on motion of E. B. Norvell, M. W. Bell and Martin, Rollins and Wright, counsel for the plaintiff, considered, ordered and adjudged by the Court that the plaintiff, Carolina-Tennessee Power Company, has duly acquired the right to appropriate and use the lands bordering on the waters in the Hiawassee River and its tributaries in Cherokee County, North Carolina, from a point about five hundred — above the mouth of Cane Creek and the spiral of the Louisville & Nashville Railroad Company near the State line between the States of North Carolina and Tennessee, to a point about two thousand feet above the mouth of the Nottley River, and for about three thousand feet up the Nottley River as set out and described in the complaint and in the amended complaint in this cause, and as marked out and specified on the plats filed in the office of the Clerk of the Superior Court of this County, as found by the jury herein and hereby made a part of this judgment;

And it is further ordered, adjudged and decreed by the Court that the defendant, Hiawassee River Power Company, has not acquired the right, and is not entitled to the right to appropriate and use for the purpose alleged in the answer, any of the lands bordering on, or the waters in the Hiawassee River and its tributaries in Cherokee County, North Carolina, from a point about five hundred feet above the mouth of Cane Creek and the spiral of the Louisville & Nashville Railroad Company, near the State line between North Carolina and Tennessee, to a point about two thousand feet above the mouth of the Nottley River, and for about three thousand feet up the Nottley River, as set out and described in the complaint and amended com-

plaint in this cause, and as marked out and specified on the plats hereinbefore referred to:

And it is further ordered, adjudged and decreed by the Court that the defendant, Hiawassee River Power Company, be, and it is hereby perpetually restrained and enjoined from,

1. Purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works of the plaintiff, Carolina-Tennessee Power Company, as shown by the marks upon the ground, or the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County, North Carolina.

2. Prosecuting any actions heretofore commenced for the condemnation of any such lands and waters, or commencing hereafter any actions or proceedings for the condemnation of the same, or any of them.

3. Entering upon or constructing or placing any dams, reservoirs, power houses or other structures or machinery of any kind on any such lands or waters.

4. And doing or committing any other acts or things which would interfere with the rights of the plaintiff, Carolina-Tennessee Power Company, or prosecuting or completing any of its plans and purposes as set forth in the complaint, and amended complaint, or which would in any way or manner annoy, delay or harrass the plaintiff, the Carolina-Tennessee Power Company, in carrying out its purposes and plans as set out in the complaint.

And it is further ordered and adjudged by the Court the Carolina-Tennessee Power Company have and recover of the defendant, the Hiawassee River Power Company, the costs of this action to be taxed by the Clerk.

(Signed)

W. J. ADAMS,
Judge Presiding.

J. D. No. 15-Page 1. M. D. No. K—Page 50.

59 NORTH CAROLINA,
Cherokee County:

(Title of Cause.)

The defendant moves to set aside the verdict and award a new trial on the ground that the verdict is contrary to the evidence. Motion overruled. Defendant moves to set aside the verdict on the grounds of error committed by the Court in the admission and rejection of evidence and the charge of the Court to the jury, overruled and exception, judgment and exception. The defendant in open Court gives notice of appeal to the Supreme Court, further notice waived, appeal bond in the sum of \$100.00 adjudged to be sufficient. The defendant is allowed 60 days from this date, April 14th, 1917, in which to serve case of statement on appeal, and the plaintiff 60 days thereafter in which to serve counter case or exceptions.

Agreement.

NORTH CAROLINA,
Cherokee County:

Superior Court.

(Title of Cause.)

It is agreed by counsel for plaintiff and defendant that the defendant be, and it is hereby allowed an extension of twenty days' time in which to prepare and serve statement of case on appeal in the above entitled action, in addition to the time allowed when the appeal was taken in open court, and that the plaintiff be, and it is hereby allowed sixty days in which to prepare and serve upon the defendant its exceptions or counter case, after the service of the statement of the case by the defendant.

This the 21st day of May, 1917.

(Signed) MARTIN, ROLLINS & WRIGHT,
Attorneys for Plaintiff.
ALLEN & LEATHERWOOD,
Attorneys for Defendant.

Filed 5-31-1917. A. A. Fain, C. S. C. By H. A. Fain, D. C.

NORTH CAROLINA,
Cherokee County:

Superior Court.

(Title of Cause.)

In the above entitled cause it is hereby stipulated and agreed, by and between counsel for plaintiff and counsel for the defendant, that the defendant shall have until the 31st day of July, 1917, within which to make up and serve its statement of case on appeal to the Supreme Court in the above case, and that the plaintiff shall have ninety (90) days thereafter within which to make up and serve exceptions or counter case.

This 16th day of June, 1917.

(Signed) MARTIN, ROLLINS & WRIGHT,
Counsel for Plaintiff.
FELIX ALLEY,
McDANIEL & BLACK,
Counsel for Defendant.

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Statement of the Case on Appeal.

NORTH CAROLINA,
Cherokee County:

In the Superior Court.

(Title of Cause.)

This was a civil action tried before his Honor, W. J. Adams, Judge Presiding, and a jury, at the April Term, 1917, of the Superior Court of Cherokee County.

The action was brought by the plaintiff for the purpose of securing a perpetual injunction against the defendant and to restrain the latter from using and appropriating the lands and water rights along the Hiawassee River in the County of Cherokee for water power purposes, alleging that the same had been previously appropriated by the plaintiff under and by virtue of its charter issued in the year 1909 and pursuant to a survey made of said river and corporate action adopting the same had in the year 1909.

The defendant in its answer and amended answer set up its claim to the lands and water rights along the Hiawassee River in the County of Cherokee for water power purposes and sought affirmative relief by an injunction against the plaintiff to restrain the latter from using and appropriating the said lands and water rights and from interfering with defendant's said development on said river in said County of Cherokee.

Upon the trial plaintiff offered the following evidence, to-wit:

Charter of the Carolina-Tennessee Power Company; Act of the Legislature, incorporating the Carolina-Tennessee Power Company, ratified February 16, 1909, being chapter 76 of the Private Laws of 1909, marked Plaintiff's Exhibit No. 1, copy attached.

62 To the introduction of this charter the defendant objected on the ground that the same was in terms and effect a monopoly and a void exercise of power by the State Legislature which undertook to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the 14th Amendment.

The objection was overruled and the defendant excepted, the same being Defendant's Exception No. 1.

STANLEY R. KETCHAM, a witness for the plaintiff, was then called and testified as follows:

My name is Stanley R. Ketcham. I live in Bronxville, New York. I am Secretary of the Carolina-Tennessee Power Company and have held this office since the Company first started.

The plaintiff then offered in evidence a certified copy of the certificate of incorporation of the Carolina Construction Corporation, dated April 28, 1909, certified under the seal of the Secretary of

State of New York, April 3, 1915, a copy of which is hereto attached and marked Plaintiff's Exhibit No. 2.

The witness Ketcham then continued to testify:

This is the minute book of the Carolina-Tennessee Power Company and contains the minutes of the meetings of the incorporators and stockholders and directors. I signed these minutes as Secretary and was present at the meetings. The resolutions contained in the minutes were adopted at the respective meetings.

The plaintiff then offered in evidence the minutes of the first meeting of the incorporators of the Carolina-Tennessee Power Company, dated May 25, 1909, copy of which are attached as Plaintiff's Exhibit No. 3.

Plaintiff next offered in evidence the minutes of the directors' meeting of the Carolina-Tennessee Power Company, dated May 28, 1909, copy of which is attached and marked as Plaintiff's Exhibit No. 4.

The witness Ketcham then testified further as follows:

I was an incorporator of the Carolina Construction Corporation and was its Secretary and Treasurer. I was present at the organization of that Company in New York and acted as Secretary at that meeting. I signed as Secretary the minutes of the first meeting of the Board of Directors of the Carolina Construction Company.

The plaintiff offered in evidence the minutes of the first meeting of the Carolina Construction Company, dated May 8, 1909, copy of which is attached and marked as Plaintiff's Exhibit No. 5.

Plaintiff then offered in evidence the contract between the Carolina Construction Corporation and the Carolina-Tennessee Power Company, a copy of which is attached and marked as Plaintiff's Exhibit No. 6.

The proceedings recited in these minutes occurred.

The witness Ketcham then testified:

The original subscribers to the stock of \$10,000.00 of the Carolina-Tennessee Power Company were Mr. Church, Mr. Cox, Mr. Smith, Mr. Elton F. Smith and myself. This \$10,000.00 was paid in cash at the meeting. I held twenty-five shares. I became interested in the water power status on the Hiawassee River about a year before the organization of the Carolina-Tennessee Power Company. Prior to the organization of that Company, the deeds for property that had been acquired were held by the Ducktown Banking Company at Isabella, Tenn. Under the contract between the Carolina-Tennessee Power Company and the Carolina Construction Corporation, \$300,000.00 of temporary bonds of the Carolina-Tennessee Power Company were issued by the Power Company and delivered to the Carolina Construction Corporation in accordance with the terms of that contract, and to enable the Construction Company to make use of them in the acquisition of funds. This \$300,000.00 of bonds were turned over by the Carolina Construction Corporation to Ketcham & Company. The money was raised on these

bonds and used in the transaction of the business, in acquiring property, engineering and legal expenses. None of the bonds were ever sold; money was borrowed on them. The Ambursen Hydraulic Construction Company referred to in the contract between the Carolina Construction Corporation and the Carolina-Tennessee Power Company was an Engineering and Contracting Company, engaged in engineering work and constructing dams. This Company was located at Boston, Mass. At the time of the organization of the Carolina-Tennessee Power Company there was a contract in existence between the Ambursen Company and myself as Trustee. The Ambursen Company put Mr. Verdell in charge of the engineering work on this Hiawassee water proposition. Mr. Verdell started to work in February of 1909. I received plats and surveys of the two basins or proposed dams made by Mr. Verdell. These two plats were received in the fall of 1909 in the New York office of the Carolina-Tennessee Power Company. These plats were used for reference in the acquisition of property. I had a line of lands made on a number of them and indicated on the copies that I kept on my desk the property that we had purchased and the property that we had under contract. Of the two original linen tracings received, I sent one of them to Mr. Smith who was in Murphy and kept the other and had some blue prints made. I had Mr. E. F. Smith and a man by the name of Ward and some other man to plat or run out farm lines and put them on toe plats. These property lines were placed on the plats in the spring of 1910. I gave directions to George E. Smith, vice-president of the Carolina-Tennessee Power Company, to file these plats with the Clerk of the Court at Murphy. These directions were in a letter written by me. I haven't the letter with me.

Defendant objected to the witness stating what were the instructions contained in that letter, the letter itself being the best evidence.

This objection was overruled and the defendant excepted, the same being Defendant's Exception No. 2.

The witness Ketcham continued to testify:

The map you show me is a map marked "Lower Reservoir," a property map of the Carolina-Tennessee Power Company. It is a map of the lower basin of that Company. The original of it was made by the Ambursen Company. The farm lines were added later. This is a copy of the original map.

The plaintiff then offered in evidence a map marked: "Map of lower basin, property map of the Carolina-Tennessee Power Company," as Plaintiff's Exhibit No. 7, a copy of which is attached.

The witness Ketcham then testified:

This other map is a map of the upper reservoir, property map of the Carolina-Tennessee Power Company.

The plaintiff then offered in evidence this map marked "Upper basin, property map of the Carolina-Tennessee Power Company," as Plaintiff's Exhibit No. 7-A, copy of which is attached.

The witness Ketcham then continued to testify:

This paper handed me is a report of the development on the Hiawassee River at and above Appalachia by the Carolina-Tennessee Power Company, dated September 1, 1909. The report was made by the Ambursen Company to the Carolina-Tennessee Power Company and was received by the latter company in the fall of 1909. 66 The plat marked No. 4 is a map of the lands along the river that would be flooded by the building of dams at the two places.

The plaintiff then offered in evidence the plat marked No. 4 as Plaintiff's Exhibit No. 8.

The witness Ketcham then testified:

Plat No. 1 in that report shows the location near the State line above Appalachia, and plat No. 2 on that report shows the location near Beaverdam Creek. The blue lines on the plat No. 2 indicate the area of the land that would be flooded by the building of these dams.

Plaintiff then offered in evidence the minutes of the meeting of the Carolina-Tennessee Power Company of January 22, 1912, as Plaintiff's Exhibit No. 9, copy of which is attached.

Plaintiff then offered in evidence plat No. 2 of the Ambursen Hydraulic Construction Company's report, as Plaintiff's Exhibit No. 10.

The witness Ketcham then continued to testify:

I am familiar with plate No. 2 on this map, which is a map of the territory within a certain distance of the hydro-electric development on the Hiawassee River. It reaches out 110 miles in every direction. It shows the territory surrounding the development for the feasibility of selling the power. The plaintiff then offers plat No. 5 of the Ambursen Company's report, as Plaintiff's Exhibit No. 11.

The witness Ketcham then testified:

The upper picture is the cross-section of the dam sites; No. L-3 is one and the other cross-section is No. U-2. U-2 means the upper dam site and L-3 means the lower dam site.

The plaintiff then offered this plat of the Ambursen Company's report as Plaintiff's Exhibit No. 12.

At the time this plat was made Appalachia was in Tennessee; it is now in North Carolina.

67 The plaintiff next offers plats No. 7 and No. 8 of the Ambursen report as Plaintiff's Exhibits No. 13 and No. 14.

The witness Ketcham then testified:

The letters L-W on the plats mean low water and the letters E-L mean elevation, with low water at 1165 feet and elevation at 1295 feet; the height of the dam would be 130 feet.

I suppose W-L on the plat means water level; with low water at 1165 feet and normal water level at 1315, the height would be 150 feet. At a meeting of the organization of the Carolina-Tennessee Power Company, held at Murphy in May, 1909, I was present. At that meeting there was a plat showing the sites of the proposed dams

on the Hiawassee River. That plat was made by Elton F. Smith and showed the proposed dam site near the State line at Appalachia and near Beaverdam Creek on the Hiawassee River in North Carolina. At that time it was not known definitely how far the dam at Appalachia would back the water up the Hiawassee River. That plat was presented before the Board of Directors of the Carolina-Tennessee Power Company and the stockholders at the time they adopted the contract or authorized the contract with the Carolina Construction Corporation. These were the two dams that were to be built under that contract. The power houses were to be built inside the dams. On the plats the two dam sites that are marked near Beaverdam Creek, they are only a few hundred feet apart. At the time the contract between the Carolina-Tennessee Power Company and the Carolina Construction Company was entered into, George E. Smith and Elton F. Smith, directors of the Carolina-Tennessee Power Company, claimed to own the lands at Appalachia on which the dam was proposed to be built at that point. The Carolina-Tennessee Power Company estimated that developments at Appalachia would

cost \$2,300,000 and the development near Beaverdam Creek would cost \$2,000,000. In addition to the survey and report

of this Company made by the Ambursen Company, I had an examination and report made by Prof. W. H. Burr. He visited the property and examined the proposed dam site and made a report. He is Dean of the Engineering School of Columbia University, Consulting Engineer of several large institutions in New York and a former member of the Panama Canal Commission. The Carolina-Tennessee Power Company paid him for his report \$2,500.00 and his expenses, and paid the Ambursen Company for its survey, examination and report \$2,500.00. The Ambursen Company had a national reputation as good engineers. Prof. Burr's standing was very high. I became interested in this development early in 1908. I sent a man by the name of Cox to Knoxville to meet Mr. Smith and report to me what Mr. Smith said and then I had Mr. Smith come to New York and Mr. Smith told me what he had done. He told me that he had taken options on property up and down the river. I then sent Mr. Smith to Murphy and had him make contracts for the purchase of property in the lower reservoir. He made contracts for the purchase of a good deal of property and took deeds. The deeds were deposited with the Ducktown Banking Company at Isabella, Tenn., and subsequently payments were made either direct to the people or through that bank and when new contracts were made, new deeds were made direct to the Power Company. In 1908, at the time the contract was made with the Ambursen Company, Mr. Smith owned some property on the river. After the Ambursen Company made its report and as soon as the titles were said to be good by our counsel, final payments were made on such lands and titles were taken in the name of the Power Company. We proceeded to acquire properties in the lower reservoir and after that we had Mr. Elton F.

Smith to make contracts for properties in the upper reservoir. Prior to January 1, 1912, the Carolina-Tennessee Power Company expended for properties in these reservoirs about

\$45,000.00. The report of the Ambursen Company was before the Board of Directors at a number of meetings in New York. Shortly after the report was received we had a meeting of the Board of Directors at the office of the Company and at that meeting a decision was had and a minute was made authorizing the acquisition of the property. I was actively engaged in acquiring property on this river for the Carolina-Tennessee Power Company for three or four years and put up \$4,000.00 when the Company started. At the time I made the contract with the Ambursen Company I had promises of money from responsible banking houses to furnish money to build the dams. Mr. Norvell was our counsel at Murphy. We also had Dillard and Hill and Ben Posey and Dillard & Bell, and afterwards we had Witherspoon & Witherspoon. At a meeting of the Board of Directors, held February 4, 1911, in New York, we had the blue prints, the ones already introduced, of the proposed developments before us. At that meeting we instructed Mr. Elton F. Smith to go ahead and acquire the property that could be acquired by purchase. The maps that we had before us laid out the contiguous lands of these proposed dams. The outside lines on the plats indicate the 160 foot contour line; that is a line 160 feet from the low water level at the lower dam site. There is a similar contour line on the plat of the upper reservoir. I came to Cherokee County, North Carolina, on this proposition in May, 1909, and after that I came frequently. Mr. Elton F. Smith represented the company here until he died, for about two years. He died in the spring of 1911. Afterwards Mr. George E. Smith represented us. He was here off and on until 1912. The purchase money for this property was ordinarily delivered to

70 Mr. Smith and he made the payments in currency. Subsequent payments I made by my personal checks, certified.

Mr. Cox remained interested in the Company until Mr. Powellson became interested. Mr. Church remained interested one year. I had the management of the Company's affairs. I consulted with the engineers and directed the representatives on the grounds as to the acquisition of property, consulted counsel as to the titles and did everything that I knew how to do to promote the business of the Company. Mr. Elton F. Smith fixed the prices at which the property was purchased; sometimes I fixed them. My associates and I spent on this entire proposed development, including the purchase of real estate up to the time that Mr. Powellson became interested, about \$92,000.00. In the fall of 1910 the only persons interested in the proposition were Mr. Smith, Mr. Cox and myself. Mr. Smith and Mr. Cox and I transferred our holdings to Mr. Powellson in the fall of 1913. The Carolina-Tennessee Power Company never offered to sell its real estate to anybody. It was estimated that 45,000 horsepower could be developed at Appalachia dam site and 35,000 horsepower at the Beaverdam site. I spent four years on this proposed development. I ceased working for the Company in the fall of 1913. We started one or two condemnation suits about the properties, in this court, I think, in 1911. At the time this action was commenced, the Carolina-Tennessee Power Company owned about fifty per cent of the frontage that was contemplated to be used for

this development. About twenty-six miles of the river would be included in the two proposed developments; about fifty-two miles of the river front, counting both sides of the river. The fifty per cent front covers water between the lower dam site where the water would run out when the dam was built and the upper dam site, and can not tell definitely the river frontage the Company had deeds for at the time suit was brought.

71 Cross-examination:

On cross-examination the witness Ketcham testified:

I am now in the chemical manufacturing business. Prior to going into this business I was a broker and in the investment business, engaged in the sale and purchase of bonds and stocks, Ketcham & Company a New York corporation. I was its Secretary and Treasurer. The Carolina Construction Company was organized prior to the Carolina-Tennessee Power Company, which was a later corporation. I was Secretary and Treasurer of the Carolina Construction Company and held the same office with the Carolina-Tennessee Power Company. Mr. Church first interested me in the Hiawasse River proposition in 1908. At that time Mr. Smith owned some property; Mr. Smith had been working on this proposition for one or two years prior to that time. I met Mr. George E. Smith in New York.

At that time Mr. Church owned no land on the river. Mr. Smith was the only man that had any interest in the Hiawasse River or the property on the Hiawasse River. When I met Mr. Smith in New York it was Mr. Smith's proposition, in so far as owning property or lands on the Hiawasse River. At that time Mr. Smith was the only one that I had any connection with that had any interest on the Hiawasse River. Mr. Smith saw me at my office and I told him that I would go into the proposition with him. Ketcham & Company was not organized at that time. Ketcham & Company were organized in the spring of 1909. Ketcham & Company, the Carolina Construction Corporation and the Carolina-Tennessee Power Company were all organized practically at the same time. Ketcham & Company went out of business in 1913, when this proposition ended. Ketcham & Company was organized for the purpose of representing Mr. Cox's interest and my interest in the Hiawasse

72 River proposition by corporation rather than by partnership, and to deal in securities. The only stockholders of Ketcham & Company were Mr. Cox and myself. Mr. Cox was President of the Construction Company and Vice-President of the Carolina-Tennessee Power Company and President of Ketcham & Company. When we organized Ketcham & Company, Ketcham & Company took over the interest that we had in the Carolina Construction Corporation. Our interest was contained in the contract with Mr. Smith for the acquisition of property and the contract with the Ambursen Company to build dams. I turned over to the Carolina Construction Corporation the agreement to turn over the property to be financed and to make a con-

tract with the Company that was to be organized. In the general water proposition to develop water power on the Hiawassee River, Mr. Smith and his brother owned 30 per cent and Ketcham & Company owned 50 per cent and Ambursen Company owned 20 per cent. Mr. Smith had stock for his interest in the Power Company. He had some stock in the Power Company and enough in the Carolina Construction Corporation to qualify him as a director. Mr. George E. Smith had 15 shares in the Power Company. When we organized the Carolina-Tennessee Power Company, the Ambursen Company had 20 per cent, Mr. George E. Smith and his brother 30 per cent, and Ketcham & Company 50 per cent of the water proposition on the Hiawassee River. Mr. George Smith paid for his stock in the Power Company. He got pay for the land that he owned when he turned it over at the organization of the Carolina Construction Corporation. Its capital stock was \$10,000.00. My recollection is that \$10,000.00 in cash was paid in on this stock. The Carolina Construction Corporation was organized for the purpose of conveying the acquired property in North Carolina to the Carolina-Tennessee Power Company and to get the securities of the Power Company and to build the dams, power houses, etc.

73 At the time the Carolina Construction Corporation was organized we did not make them any assignment of the Hiawassee River proposition. There was an agreement to transfer. We transferred to the Carolina Construction Corporation all the interest that Ketcham & Company had in this proposition. Ketcham & Company's interest was under an agreement with Mr. Smith to acquire the property and we paid the money for it and had the deeds deposited in the bank at Ducktown. Ketcham & Company first had an agreement with Mr. Smith to acquire the property. We never transferred any property to the Carolina Construction Corporation. The Carolina Construction Corporation gave half of its stock to Ketcham & Company for the transfer by Ketcham & Company of its agreement with Mr. Smith. Ketcham & Company got this stock in the Construction Company for the interest that Ketcham & Company had in the power proposition. Ketcham & Company had been organized for this purpose. Ketcham & Company turned over no property to the Carolina Construction Corporation. I turned it over under that order to the Carolina-Tennessee Power Company. Mr. Smith was paid \$15,000.00 for his property on the river. This \$15,000.00 was secured upon bonds of the Carolina-Tennessee Power Company which had been delivered to the Carolina Construction Corporation. This money was obtained under an agreement with Ketcham & Company who loaned a certain number of bonds to the Company and in consideration of that certain advances were to be made to Ketcham & Company and it was out of these advances that Ketcham & Company paid Mr. Smith. This other party advanced this money on the security of the bonds of the Power Company. Mr. Smith took the bonds of the Power Company at eighty cents on the dollar. Ketcham & Company transferred the Hiawassee River proposition to the Carolina Con-

74 struction Corporation and the Carolina Construction Corporation became the owner of the Hiawassee River proposition under the contract between it and Ketcham & Company.

In May, 1909, the Carolina Construction Corporation was the owner of the Hiawassee River proposition which it had bought from Ketcham & Company and Mr. Smith. Then the Carolina Construction Corporation, the owner of the proposition, made a contract with the Carolina-Tennessee Power Company. Under this contract, the Carolina Construction Company, the owner of the proposition, was to acquire lands, build a dam, build transmission lines, build a power house and turn over that completed proposition to the Power Company. That is what the contract between the Carolina Tennessee Power Company and the Construction Company says in substance. Under the contract the Power Company was to issue \$5,000,000.00 of stock and \$5,000,000.00 of bonds, and pay for this completed proposition that the Carolina Construction Corporation was going to turn over to it. The contract between the Power Company and the Construction Company was made on May 28, 1909. I signed the contract between the Power Company and the Construction Company. That contract is a contract between the Construction Corporation as owner of the water power property and the Power Company as purchaser. Under the contract the Carolina Construction Corporation agrees first that it will obtain and complete a good title to all the lands necessary to erect a dam 120 feet in height and that it will build a dam and do all things necessary to complete the water power proposition and that it will cause the completed proposition to be vested in the Power Company; and second, that it will cause a dam 120 feet in height to be erected at the proper place and a power house to be erected and will install electrical equipment and spillways, and that it will, upon demand of the Power

75 Company, erect another dam at least 100 feet in height, of similar construction, to the first above mentioned dam, at a point in the Hiawassee River above the point where the water impounded by the first mentioned dam will cease, for the purpose of forming and creating another storage reservoir and that it will acquire the real estate necessary for such dam and reservoir and that it will do all other things necessary to make a complete water power proposition and turn it over to the Power Company. I had the Carolina Construction Corporation to pass a resolution to make this contract, and had Ketcham & Company, the other corporation, to pass a resolution to turn the proposition over to the Carolina Construction Corporation. The Power Company made this contract with the Construction Corporation and turned over to them \$300,000.00 worth of bonds. The Carolina Construction Corporation bought some of the lands contemplated and paid for it about \$52,000.00. The Power Company got nothing else for this \$300,000.00 worth of bonds except the reports, information and maps. The Carolina Construction Corporation is still carrying out this contract, so far as I know. As the water power proposition now belongs to the Construction Corporation, it is under contract to be delivered to the Carolina-Tennessee Power Company when it is completed. I know

of nothing being done to abrogate the contract between the Power Company and the Construction Corporation. The Carolina-Tennessee Power Company still relies on the Construction Corporation. I am still Secretary of the Construction Corporation. This contract between the Construction Corporation and the Power Company is extant and I know of nothing that has been done to abrogate it. This contract between the Construction Corporation and the Power Company said nothing about where the dam was to be built except on the Hiawassee River. I think it referred to the location as being in North Carolina. We had a place for the dam. In 76 the contract between the Power Company and the Construction Corporation the agreement was that a dam should be erected at a proper place on the Hiawassee River. Nothing was said about Appalachia or the Beaverdam. In the contract the Construction Corporation agrees first to buy the land and second to build and complete a dam at a proper place on the Hiawassee River and a power house and to do all things necessary to complete the water power proposition. The Construction Company has not got all the lands necessary and has not built the dam, so that the things contemplated in the contract are sometime in the future. In the contract where it refers to another dam to be built and another proposition to be completed, nothing is said about Beaverdam; the contract just says anywhere where the water from the first dam, built at a proper place, may back up and at such place another dam was to be built. The Construction Company agreed to acquire the real estate necessary for the dam and reservoir for the upper dam. We have acquired some of this land. We stopped acquiring land in the lower reservoir because we could not get good titles to it. We were going to build the second dam after we got through with the first dam if the Power Company required it. The Power Company has never required it. The second dam does not have to be built until the Power Company requires it. The contract was made eight years ago—in 1909. The only person to make request for the second dam was me as Secretary of one Company upon myself as Secretary of the other Company, if you want to put it that way. In this contract the Power Company agrees that in consideration of this contract and of the agreements of the Construction Company as herein contained that it will at once, upon the execution of this contract, issue and deliver to the said Construction Company \$5,000,000.00 par value of its capital stock, and \$300,000.00 face value of first 77 mortgage 5 per cent bonds. The Power Company delivered \$300,000.00 of bonds and \$2,300,000 of stock. In the contract the Power Company also agreed that it will execute and record a mortgage upon the premises acquired by it and upon all of its rights, powers, privileges and property for the sum of \$5,000,000 and that it will at once cause to be issued \$2,300,000 face value of 5 per cent bonds secured by said mortgage. This mortgage was executed. This mortgage covered any property that the Company owned or that it might thereafter acquire. At that time the Power Company did not own a foot of property; it just mortgaged what it was going to get in the future for the \$5,000,000. We never did sell the \$300,-

000 of bonds. The mortgage covered afterwards acquired property, and after that the Power Company acquired \$52,000.00 worth of property along the river. That was the amount of money paid for the property. The mortgage of the Power Company was dated April 1, 1909, which was prior to the organization of the Power Company. It was executed in June. The contract between the Power Company and the Construction Company has never been completed. It is possibly still in process of completion. There was an amendment to the certificate of incorporation, increasing the capital stock from \$250,000.00 to \$5,000,000.00 and at the meeting of the incorporators of the Carolina-Tennessee Power Company, dated May 25, a resolution was passed providing for this increase.

This resolution was provided for the purpose of acquiring lands, building dams, etc., for the completion of the water power proposition. The resolution is the authorization of the Carolina-Tennessee Power Company of the contract that was made with the Carolina Construction Corporation. In this meeting of May 25th the Carolina-Tennessee Power Company recognizes in the resolution passed that the Carolina Construction Corporation

78 is the owner of the water power proposition upon the Hiawassee River. The contract between the two companies also says that the Carolina Construction Corporation was to acquire the lands and build the dams and build the power houses, and the contract is still in existence, so far as I know. At the meeting of the Board of Directors of the Carolina Construction Corporation, May 8, 1909, the following resolution was passed:

"It is now resolved that this Company accept such proposition and take an assignment of said water power proposition, (that is the water power proposition on the Hiawassee River), and to issue to Stanley R. Ketcham as Trustee, as consideration for such assignment, 400 shares of the capital stock of this Company, when requested by said Ketcham so to do, and enter into a contract with the parties assigning the same, reciting the conditions under which the same shall be held by this Company and that the officers be authorized and directed to issue said shares of stock and to execute such contract."

That assignment was made to the Carolina Construction Corporation, and all interests that Ketcham & Company had in the Hiawassee River proposition was assigned and transferred by Ketcham & Company to the Carolina Construction Corporation for \$40,000.00 worth of stock. The rough map made by Elton F. Smith, during the early part of 1908, was made before the organization of the Power Company or of the Construction Company. That map don't show any dam at Beaverdam Creek. I knew about that dam. The contract with Ambursen Company was made in 1908. In this contract I agreed to go into the proposition and the Ambursen Company agreed to do the engineering work and I agreed to see that a corporation was organized and that they should have a contract to build the dams with such organized company. Under the contract between Ketcham

79 & Company and the Ambursen Company, the latter Company was to do the engineering work and I was to have the Company organized make a contract with the Ambursen Company for the building of a dam. That contract with the Ambursen Company was carried out to the extent that I organized the Company and they had a contract with them and to the extent that they did some of the engineering work.

I did not have the Power Company to make a contract with the Ambursen Company for the building of a dam; I had the Construction Corporation to make such contract in 1909. The Construction Company bought out the interest of the Ambursen Company, and that left Mr. Cox, Mr. Smith and myself the owners of the proposition. That is one reason the Ambursen Company never built the dam. We had a regular contract with the Construction Corporation to build it. I think the contract contemplated both dams. We never had a contract with anybody else to build the dams. The two maps are marked: "Lower Reservoir property map of the Carolina-Tennessee Power Company," and "Upper Reservoir property map of the Carolina-Tennessee Power Company," and are copies of the maps made by the Ambursen Company, except the farm plat lines have been put in there. They are copies made from Mr. Verdell's maps. These are the maps which I sent to Mr. Smith to be filed. The maps of the Lower Reservoir property maps shows no dam site, except one is indicated at the end of the contour lines. There is no other indication of where a dam would be built. I am concluding from the fact that the contour lines end at a certain point. That is where the plat indicates that a dam was to be built. When I sent a representative to see Mr. Smith he indicated that he owned some property at Appalachia, right at the State line. I bought this property from Mr. Smith. The Carolina Construction Corporation had Mr. Smith to transfer all of the property that he was holding as Trustee 80 to the Carolina-Tennessee Power Company, and had Mr. Smith to do this because that was a part of the contract between the Carolina Construction Corporation and the Carolina-Tennessee Power Company, and that transfer from Mr. Smith to the Carolina-Tennessee Power Company was a transfer made in pursuance of the agreement of that contract. Mr. Smith owned at Appalachia about 20 acres and owned some land back up towards Murphy. The 20 acres that he owned at Appalachia was where it was first talked about building the dam. It was on the south side of the river. The land on the north side of the river right across from the Smith land was owned by the Southern Extract Company. I have heard that they owned a big tract. This map says 44 acres. That is the number of acres embraced within the basin that is owned by the Southern Extract Company. Mr. Smith owned on the south side where he talked about building the dam, and the Southern Extract Company owned on the north side. I do not know who owns on the north side of the river now. The Carolina Construction Company don't own on the north side. The Carolina-Tennessee Power Company don't own on the north side at Appalachia. As to how we were going to build a dam when we did not own on the other side of

the river—I say that the ownership makes no difference. We had the right to acquire it; we have not acquired it, but we have made some negotiations. We have not condemned it. Relative to that land necessary for the lower dam site, we are right where we were eight years ago, except that I have some more knowledge about the property. At the other place on the river where Mr. Smith talked about building a dam at Beaverdam Creek, we owned no property on either side of the river in May, 1909. The Carolina Construction Company was not going to build a dam at Beaverdam and turn it over to the Tennessee-Carolina Power Company when it did
81 not own any land around there at all. They were going to acquire the property. They had a contract to acquire part of it from Mr. Smith at that time. Some of it has been acquired. In 1909 the Company owned no property around Beaverdam Creek, but in 1912 it owned considerable property; I mean we had contracts with quite a number of owners, in 1912. In 1912 we did not own the land on both sides of the river at Beaverdam Creek, either above or below Beaverdam Creek. When I went into this proposition in 1909 I got some deeds to some property up and down the river in 1909 and in 1910.

We began taking titles in 1910. I could not tell you how much we had gotten titles to up to 1910, nor up to 1911, nor up to 1912, nor could I tell you how much we had under contract. I never impressed myself with those facts. I used to have a map on my desk when I was active in the service of the Company and I could tell it with certainty but I could not do it now. As to the property owned by the Carolina-Tennessee Power Company at the date of the filing of the suit, some of it is scattered; most of it is together. The Carolina-Tennessee Power Company does not now own the property from where Mr. Smith said he was going to build a dam at Appalachia on both sides of the river as far back as it would pond the water if the dam was built there. We have not now got a completed water power proposition at either one of the places where we were talking about building the dams. I think some more deeds to the property were taken after 1910. They were deeds taken to the property that we had bought during 1910. I think there were two contracts made in 1910. I did not buy any property in 1911 or 1912 or 1913 or 1914 until Mr. Powellson became interested. I think we made some optional contracts in 1911 and two in 1912. We made none in 1913. I am still Secretary of the Carolina-Tennessee Power Company and have enough stock to qualify me as a Director. I had
82 nothing to do with the active management of the Company during the months of 1914 up to June. The two maps of the reservoirs were the two maps that I sent to Mr. Smith to be filed in the Clerk's office. I sent them in June, 1911, to be filed. I did not send them prior to that time because I did not think there was any occasion to have them filed prior to that time. At that time we contemplated bringing some condemnation proceedings and the charter required that the maps be filed before the condemnation proceedings were brought. I sent the map because we could not properly bring condemnation suits until after the maps

were filed. As I understand our charter, it provides for that. I did not know, as Secretary of the Company, that we could not have any land or use any land until we had filed these maps. They were sent because we were going to bring condemnation proceedings. One party against whom we were going to bring condemnation proceedings was Mrs. Coit; another was Mr. Browning. I knew that Mr. Browning was down here trying to make contracts for lands and sell them. Mr. Browning went to my attorney, Mr. Norvell. Mr. Browning offered to sell me through my attorney. He had nothing to sell. The reason that the condemnation suit was filed against him was because we started to file condemnation proceedings against a piece of property and he had a contract on that and he had to be made a party to it. Mrs. Coit owned that property. She lived in California. Mrs. Coit's land was 25 miles, probably, from Appalachia. The proposed dam at Appalachia would not have flooded her lands; the one at Beaverdam would have flooded about 133 acres of her land. We pushed the condemnation suit until it was transferred to some Federal Court. It was filed in 1911, and is still pending. We have made attempts to try it but have never tried it. At the same time, we started another condemnation suit against Mr. Ramsey. His property was located down the river a little ways. The Appalachia dam would not have backed the water on it, but I think the Beaverdam would. We never have tried that suit. The Carolina Construction Company paid the Ambursen Company by buying out their interest. Ketcham & Company, for the account of the Carolina Construction Company, paid Prof. Burr. In all of the options or contracts that we took for land, there was a clause in them that they were null and void if the payment agreed to be made in them was not made. In the fall of 1913 the financial condition of the Carolina-Tennessee Power Company was that it had this property that the Carolina Construction Corporation had caused to be transferred to it, of the approximate valuation of \$52,000.00, and had these bonds out-standing for \$300,000.00 and its stock out-standing for \$250,000.00. Mr. Norvell has been the attorney for the Company ever since it started, and also our agent at Murphy and so designated. Mr. Norvell brought a suit against the Company for a receiver in 1913. Mr. Dillard's employment as counsel had ceased prior to the bringing of that suit. I do not know what Mr. Powellson paid for the securities of the Power Company. I never tried to buy Mrs. Coit's land, but I think Mr. Norvell tried to buy from her agent, Mr. Fain. Elton F. Smith took options on lands down on the river in 1909 and 1910. I remember an option that I made with W. E. Lovingood. I did not take it up nor pay him; I did not have the money. I took an option from Mr. T. M. Raper. I did not pay him; I did not have the money. I took an option from Mr. W. H. Reece. I never paid him in full. I did not have the money. I took an option from Jessie Stiles. I never paid him for the same reason. I think there was some imperfection in his title. I took an option from W. S. Roberts. I paid him \$2,000.00 and owe him a balance of \$5,000.00.

I have not paid him that balance. It is past due. I had an
 84 option with W. B. and Verdie Raper. I did not pay them;

I did not have the money. The same is true of the options with Tillman and Adeline Mashburn and the option with W. A. Mashburn and the option with W. H. and F. E. Johnson and with C. B. Hedrick and wife and with W. M. and S. T. Fain and with T. A. and H. A. Davis and H. A. and Amanda Davis and H. A. and Avery Crisp and with Sam F. Chambers. I paid Chambers \$1,300.00. He did not have a good title. The balance due him is not yet due until he gets a good title. I think I paid L. C. Hamby, but it has been so long ago I am not very positive. The papers will show. I do not remember about George and Emmeline Hamby. I remember an option with William Ramsey. I did not pay him because I did not have the money. I did not take up any option with W. A. and Frances Mashburn or Mary Hyatt or W. F. and F. E. Johnson or with E. A. and Mollie Voyles or with W. K. and Florence Johnson or Jesse Stiles or H. A. and T. N. Davis or T. G. and Harriett Stiles or W. P. James or Lola Hartness or John Stiles or Q. W. and Paralee Stiles, because I did not have the money to take up any of these options. I had an option with J. R. Carroll and the Company took title to that land some time since that time. I do not remember an option with A. I. and F. E. Johnson, or M. L. Martin. I remember the optional contract with H. A. and Amanda Davis and with C. T. and Lillie Roberts. I did not take up these options because I did not have the money. I do not remember whether we had an option with W. H. and Sarah A. Reece. I did not take up any option with S. W. Lovingood because I did not have the money; for the same reason I did not take up an option with S. C. and Paralee Mings. None of these contracts were taken up by us because we did not have the money. Every piece of property covered by these

options lies in one or other of the basins necessary for the Com-
 85 pany's development. We did not take them up because we did not have the money, absolutely. All of them were taken back in 1909, 1910 and 1911. In each of these options there was a clause as follows: "Now, therefore, if the said E. F. Smith, trustee, his heirs or assigns, shall well and truly pay or cause to be paid the balance of purchase money as and when it becomes due, as above stated, this obligation shall remain in full force and effect, otherwise it shall be null and void." Our property was sold for taxes in 1913. I do not know whether it was sold for taxes last year or not.

Redirect examination:

I do not know which of these options have been taken up by Mr. Powellson since I became inactive in the Company's management. These options were taken in 1909, 1910 and 1911. At that time we were not in funds. We could not get the money. We had arrangements with bankers, but they did not "come across" with the money. Mr. Powellson and the people who held the securities of the Carolina-Tennessee Power Company came into control of that Company at the end of 1913. This suit was brought in August, 1914. During

the time that I was active in the management of the Company I paid out \$52,000.00 on these lands. We made arrangements with the people from whom we bought the lands to let them stay on the lands and occupy them, with the proviso that they would pay the taxes, and if at any time we wanted to take possession and they had growing crops, we would pay them for the crops. I did not know when the Company would take charge. The arrangement that we made was that if the dam was built, and if they had cultivated the land, and we wanted to take possession and they had growing crops, that we would pay them for the crops. No other securities of the Power Company except \$300,000.00 of bonds and \$240,000.00 of stock have ever been delivered to the Carolina Construction Corporation under the contract between the Power Company and the Construction Corporation. The Construction Corporation, during the years 1910 and 1911, never finished the development because they could not get a sale of the securities of the Power Company. As to condemning the property we did not acquire, the reasons and causes were different. The policy that I pursued was not to condemn unless it was absolutely essential. We endeavored to negotiate and acquire the property by agreement if it were possible. The mortgage that was made by the Power Company was executed in June, 1909. It was filed in September I think. At the time the mortgage was executed the Carolina-Tennessee Power Company had acquired title to some of these lands. During 1910 and 1911 I spent most of my time endeavoring to make a market for the securities of the Carolina-Tennessee Power Company; I kept this up for three and a half years. I never found a purchaser. I was introduced to Mr. Powellson by my attorney. I sold my interest to Mr. Powellson except enough stock to qualify me as a Director. Mr. Powellson is President of the Company. The rough map that Mr. Smith had at the meeting when the Company was organized showed two dam sites; it showed all of the upper reservoir where we thought the dam would be, but it did not show the river very far above that.

The plaintiff here introduced certified copy of the contract between the Construction Corporation and the Ambursen Hydraulic Construction Company, dated July 13, 1909, as Plaintiff's Exhibit No. 14-A, a copy of which is attached.

The witness Ketcham then continued to testify:

Prior to the time that the contract between the Construction Corporation and the Ambursen Company was made, I had, in 1908, as Trustee, made a similar contract with the Ambursen Company. My only purpose and intention in connection with this proposition, from the day that the Company was organized down to the day that I ceased to be active in its management, was to develop the water power on the Hiawassee River between Appalachia and where the water would run out over the upper dam; to furnish electric power to the public to complete its works according to the engineer's plans and findings. As to why the Company did not have the money to take up the options on the lands, I say that when I went into this proposition I was assured by my associates that he

would furnish the necessary money if I would get together a nucleus of property to make a development on the Hiawassee River. He furnished some of the money in 1909 and 1910 and up until 1912, although he did not furnish money as fast as I had expected him to, and after he ceased to furnish money, I endeavored to interest other people who might become interested in the thing, and finally met Mr. Powellson and did interest him; he became interested and his associates were men who had sufficient money to carry out the purposes of the corporation. My associates and I put up something like ninety-odd thousand dollars on this proposition. We made payments on the contracts to buy land in 1909, 1910, 1911 and 1912. We made a payment to W. S. Roberts of \$2,018.00 on April 27, 1912. The Hiawassee River, where these developments were proposed to be made, run- from northeast to southeast; there are a good many bends in it. The general direction from the height of the proposed back-water to the lower station at Appalachia is a westerly direction. The land owned by the Smiths at Appalachia at the time the Company was organized was subsequently conveyed to the Company by the Smiths. The Extract Company owned the land across

88 the river from the Smith land. I did not purchase or condemn the property of the Extract Company because my purpose was not to condemn any property unless it was absolutely necessary and I was informed that if I could locate some people that I could get a good title to the property; if that could not be done, of course, we would condemn it. As I understand the situation, the Company has the right to condemn all land for its development. At the time this action was brought the Company owned the land on both sides of the river at the proposed dam site near Beaverdam Creek. All of the money that was put into these developments, except the money that I put up prior to the organization, was money furnished by us from the securities of the Power Company. This money was furnished through the Construction Corporation. The first \$10,000.00 was paid into the Company in cash by my associates and me. A great many titles to lands were condemned by counsel, Mr. Norvell. The question that Mr. Black asked me with reference to the Carolina Construction Corporation was left in a rather indefinite way. He asked me if any action had been taken or if the contract between the Power Company and the Construction Corporation was still in existence, and I told him that so far as I knew, no legal action had been taken to abrogate that contract, but after Mr. Powellson and Bretand, Griscomb & Company had taken control of the securities, they ignored the Carolina Construction Corporation. I am an officer of the Carolina Construction Corporation. I said they did not take any action; they ignored it. No legal action was taken to abrogate the contract. They brought no suit. No final release has ever been executed between the parties; that is what I meant this morning when I said that the thing was left in an indefinite manner.

89 Recross-examination:

I say that it was left in an indefinite way yesterday, because I said there had been no legal action taken to abrogate it. I was asked yesterday if I was still interested in the Carolina Construction Corporation and I said that I was. I was asked if I was still interested in the Carolina-Tennessee Power Company and I said that I was interested nominally so as to retain my place as Secretary. I was asked if the contract between the Carolina Construction Corporation and the Carolina-Tennessee Power Company was still in existence and I said yes so far as I knew. I was asked on yesterday if it was not the intention of the Carolina Construction Corporation to carry out that contract and I answered "yes." Nothing happened last night to change the intention of the Carolina Construction Corporation; I still own stock in the Carolina Construction Corporation. As to the intention of the Carolina Construction Corporation to carry out the contract with the Carolina-Tennessee Power Company, I said that no legal action had been taken to abrogate it. The intention is still the same as it originally was. I was asked on yesterday if it was the intention of the Carolina Construction Corporation to carry out its contract and I said "yes." That is the reason I wanted to make a statement; it leaves an erroneous impression, because the Carolina Construction Corporation cannot carry out the contract. Under the power of condemnation of the Company, there is no trouble about acquiring lands where the title is defective under condemnation proceedings, except that where you condemn, if there is an award, you have to pay the money, and we did not have the money and I could not pay for the condemnation suits. I was informed that if I could get hold of certain people I could get good titles to the land of the Southern Extract Company who owns
90 across the river from the dam site at Appalachia. I did not get hold of them. I never got their land.

D. T. McNABB, sworn for the plaintiff, testified as follows:

I live on Permission Creek, in this County, and have lived there about six years. Prior to that time I lived on the Hiawassee River three miles above Appalachia. I am familiar with the lands lying along what is referred to on the map of the Carolina-Tennessee Power Company as the lower basin. I took options for the Carolina-Tennessee Power Company, acknowledgments for options and also for conditional deeds later, and when they took up the conditional deeds, I took the acknowledgments on the permanent deeds. They had a good many of them. I know the dam site referred to near Appalachia. Starting at the dam site at Appalachia, on the south side of the river, the following persons owned property at the time the Carolina-Tennessee Power Company bought it: George E. Smith and Elton F. Smith had a little tract of land where the supposed dam site was on the South side, and Mr. Hickey owned a little piece, Mr. Hickey sold a part of his tract to Smith Bros. and he retained a part of it, and there was a portion of the land lying right in there (witness indicates on the map); then that is in Tennessee. I don't

know who owned that. The river then makes a bend and there is a little portion there in Tennessee. Then, some distance above this proposed site, Mr. Hickey owned another farm. Then comes William Hamby. The Hickey place was not bought by the Company. The Hamby place was. The Hamby place has a frontage on the river, which is just guesswork, of nearly two miles on the south side of the river, across the river on the north side Hamby fronted not over a mile, I guess. The Company took a conditional deed to the

91 Hamby land and paid \$100.00 on it, but never did finish paying for it. The George Hamby land lay on the south side, lay on both sides. Above Mr. Hamby was Mr. Baines,

with a river front of two or three hundred yards. The Company bought that. Next to Mr. Baines was T. C. Kilpatrick. This had a frontage not more than three or four hundred yards. This is guesswork as I never measured it. The Company bought it. Next, coming up the river, was J. E. Shearer, with a river front of something like three-quarters of a mile. The Company bought it and paid for it. Next was my land, with a river frontage of something over a mile. The Company bought it and paid for it. Next was the land of J. R. Deaver, with a river front of three-quarters of a mile, I guess. They bought it. Next was J. M. Deaver, with a front of one hundred yards; the Company bought that. Next was the land belonging to a man by the name of Kilpatrick, but before the deal was closed, a man by the name of Shearer secured it from them and got a deed for it. The next property above that belongs to Lens Hamby. The Company never secured that. They had options a time or two, but when they came to take the conditional deed, he flew up so high they refused to buy it. A number of efforts were made to buy. The next land was owned by Prior Nelson. It was not bought. An effort was made to buy it. Next to Nelson was Robertson. I do not know how much frontage he had. It was bought. The next was owned by the Crane heirs. It was not bought. I do not know who the next property owner was. That brings us up to about where Julius Reed's property comes in and the Elisha Nelson property. I am not so familiar with that. Across over the river on the north side, beginning at Appalachia, the first land was owned by the Southern Extract Company. It was not acquired. The next was the William Hamby land; next was George Hamby's. It was contracted for

92 but never taken up. The next was the Bates land. Several efforts were made to buy but we never could get a deed with

Bates. The next was owned by L. D. McNabb, my brother. That was bought and paid for; it had a frontage of about one and a half miles. The next was owned by David Hamby, with a river frontage of about a mile. It was bought. The next was owned by Wright Taylor, with a river front of about a mile; it was bought. The next was owned by Patton Taylor; it was not bought. The next was owned by Thurm Hamby. We never could get a conditional deed. We took several options and the options ran out and Smith sent me back to make an agreement with him again to hold up the option; the option ran out and he wanted sixty days more and I paid him \$15.00 to give us the sixty days' option and at the expiration of the sixty days, or soon after, we let that option run out, and then

came with the conditional deed and never could get him to any agreement on it. By conditional deeds, I mean that they made deeds and carried them to the bank in escrow. The deeds were to be executed and delivered to the bank and taken up as the money was paid. The deeds were placed in escrow for eighteen months, maybe twenty-one months, and were, at the expiration of three months, all to have a payment, and if that payment was not made, the deeds to be null and void, and if that payment was made, they were left in the bank until the expiration of the eighteen months and then the full amount to be paid. That was a temporary deed, or whatever you may call it, taken at first. That was the kind of a deed that Hamby would not execute. Next above Mr. Hamby on the north side was the property of Lenderman. We purchased his land. Mr. Reed's land was along in there. It was not purchased. On the Lenderman land the Company acquired a frontage of about three-quarters of a mile. Above Lenderman the Company acquired McDonald's land. I do not know its river frontage. It then acquired some land from the Plemmons. The Whitcomb lands lie right at the mouth of Beaverdam Creek. They made several efforts to secure them, but the old man Whitcomb was dead and it came through the heirs some way or other. They got the promise, but I don't know whether they ever got the deed or not. We purchased the Logan Mashburn land that lay above the Plemmons land. That was in the upper basin. That is as far up as we went on the north side. We bought over on the south side from R. H. Robertson, in the upper basin above Beaverdam. We had there between one-half and three-quarters of a mile frontage. I did not help buy any other. It was in 1908 that I represented the Company in these purchases. We took the deeds, I think, in 1909; the deeds will show. I took the acknowledgements of a great many of the deeds that were placed in escrow, but I did not take many of the Company's deeds. I knew Mr. Verdell. I saw him and his associates on the property in the lower basin. He had three or four or five men with him. They seemed to be surveying up and down the river in the lower basin. I have refreshed my recollection and find that I took acknowledgments of deeds in 1910. Mr. Verdell and his men were setting stakes and measuring poles of some both sides of the river. They surveyed on the lands and the stakes were set out some little distance. I think they surveyed out a countour line over my land. Some of the stakes had figures on them. The stakes went up and down the river. The lines were staked out. I saw about three miles of river frontage to Appalachia staked out. I saw the stakes occasionally along down there and back up the river a mile or so from where I live. I guess, in all, about six miles. I do not know if it was staked out in every place. I saw the stakes very often. They were about ten inches, on an average, above the ground, about three inches in diameter. They were driven in the ground.

94 Cross-examination:

The stakes that I saw were on the side of the bluffs or mountains over beyond the river banks. Nothing was cleared out so anybody

could see these stakes, only where they cleared around there to work. I do not remember the marks on them, I am not an engineer. I just lived on the river; if I had seen the stakes I would not have known what the marks on them meant. The stakes were about one hundred yards apart. I was Justice of the Peace, and the work that I did was as Justice of the Peace, in taking the acknowledgments. The deeds that I took were conditioned upon the money being paid. A certain part of the money was to be paid in three months and another in six months and the balance in eighteen months. I do not remember any money paid at the time the deeds were taken; they were just conditional deeds, conditioned upon a payment being made in three months, and when that time elapsed they became void, and if that payment was made in three months, then the other payment was made in eighteen months. The money to be paid in this clause of the conditional deed at the end of the first three months ran from \$50.00 to \$200.00. On the north side of the river at Appalachia the Southern Extract Company owned. The Carolina-Tennessee Power Company had a frontage on the south side at Appalachia of about three hundred yards. The Southern Extract Company's frontage on the north side of the river, across the river at Appalachia, was not much more than half a mile, unless you count their land in Tennessee, and if so, the river frontage at that point was about a mile and a half. The Tennessee lands of the Southern Extract Company was necessary if the dam was built at Appalachia. The dam would have flooded their land. That frontage would have to be

95 obtained before the dam could be built at Appalachia. On the south side of the river next to the Hickey land was some Tennessee land. This Tennessee land was about between a quarter and a half of a mile. All that the Company owned at the dam site was seven acres of the Hickey land. Next to the Tennessee land was some more Hickey land; the Company did not own that. That was over a half a mile river frontage. At Appalachia, on the south side of the river, there is possibly a mile of frontage that the Company did not own. Next to the Hickey land was the William Hamby land, that had about two miles of frontage that the Company bought. Next to that was the George Hamby land, with a frontage of about two-thirds of a mile, that the Company did not acquire. On the north side of the river, next to the Extract Company's land was the William Hamby land; next to the William Hamby land was the George Hamby land, that the Company did not buy. He had about a mile or three-quarters of a mile frontage. In the lower basin was the Thurm Hamby land, which had a river frontage of about three or four miles; the Company did not buy that. I went around with Mr. Smith a good deal getting up options in 1906. I don't think I done anything for him much until 1907. I worked in 1906, 1907 and 1908.

Redirect examination:

I was paid by the Company or by Mr. Smith an additional salary to my fees as Justice of the Peace, so that I was in the employ of the Company in addition to being Justice of the Peace.

Plaintiff's counsel next offers in evidence the following papers, deeds and contracts covering the lands and portions of lands in the lower basin and the upper basin.

Deed from W. S. Lenderman to the Carolina-Tennessee Power Company, dated the 28th day of July, 1910; registered August 17, 1910, as Plaintiff's Exhibit No. 16.

96 Deed from C. R. McLemore and wife to the Carolina-Tennessee Power Company, dated the 11th day of August, 1910; registered the 24th day of August, 1910. Sixty-five acres,—as Plaintiff's Exhibit No. 17.

Deed from J. E. Shearer et ux. to the Carolina-Tennessee Power Company, dated 11th day of August, 1910, recorded the 24th day of August, 1910, as Plaintiff's Exhibit No. 18.

Deed of conveyance from D. T. McNabb, et ux, to the Carolina-Tennessee Power Company, dated the 11th day of August, 1910; recorded the 24th day of August, 1910, covering 117 acres, as Plaintiff's Exhibit No. 19.

Deed from R. L. Plemmons, et ux, dated the 18th day of August, 1910, and duly recorded on August 22d, 1910, 77 acres, as Plaintiff's Exhibit No. 20.

Deed from J. H. Plemmons, et ux, to the Carolina-Tennessee Power Company, dated the 18th day of August, 1910, recorded August 25th, 1910, 275 acres, as Plaintiff's Exhibit No. 21.

Deed from James M. Plemmons, et ux, to the Carolina-Tennessee Power Company, dated August 18, 1910, recorded August 23, 1910, 110 acres, as Plaintiff's Exhibit No. 22.

Deed from L. D. Mashburn to the Carolina-Tennessee Power Company, dated August 18, 1910, recorded April 17, 1911, as Plaintiff's Exhibit No. 23.

Deed from R. H. Robertson, et ux, to the Carolina-Tennessee Power Company, dated August 18, 1910, and recorded on October 10, 1910, as Plaintiff's Exhibit No. 24.

Deed from McNabb and heirs to the Tennessee-Carolina Power Company, dated the 22d day of August, 1910, and recorded August 30, 1910, as Plaintiff's Exhibit No. 25.

Deed from John M. Robertson, et ux, to the Carolina-Tennessee Power Company, dated the 23d day of August, 1911, registered October 1, 1910, as Plaintiff's Exhibit No. 26.

Deed from T. E. Hamby, et als., to the Carolina-Tennessee Power Company, dated August 25, 1910, recorded October 1, 1910, as Plaintiff's Exhibit No. 27.

Deed from T. D. Kilpatrick and wife to the Carolina-Tennessee Power Company, dated September 9, 1910, and recorded October 4, 1910, as Plaintiff's Exhibit No. 28.

Deed from S. G. Baines, et ux., to the Carolina-Tennessee Power Company, dated September 19, 1910, recorded October 4, 1910, as Plaintiff's Exhibit No. 29.

Deed from George E. Smith, et als., to the Carolina-Tennessee Power Company, dated the first day of October, 1910, recorded December 1, 1910, as Plaintiff's Exhibits 30 to 33, inclusive.

Deed from Wright Taylor to the Carolina-Tennessee Power Com-

pany, dated October 7, 1910, recorded December 1, 1910, as Plaintiff's Exhibit No. 34.

Deed from West McDonald, et ux, to the Carolina-Tennessee Power Company, dated November 1, 1910, recorded December 1, 1910, as Plaintiff's Exhibit No. 35.

Deed from J. M. Deaver, et ux, to the Carolina-Tennessee Power Company, dated November 7, 1910, recorded December 1, 1910, as Plaintiff's Exhibit No. 36.

Deed from Rosana Bridges, to the Carolina-Tennessee Power Company, dated November 17, 1910, recorded December 20, 1910, as Plaintiff's Exhibit No. 37.

Deed from J. R. Deaver, et ux, to the Carolina-Tennessee Power Company, dated November 10, 1910, recorded December 1, 1910, as Plaintiff's Exhibit No. 38.

Deed from George E. Smith and E. F. Smith to the Carolina-Tennessee Power Company, dated the 15th day of November, 1910, recorded December 21, 1910, as Plaintiff's Exhibit No. 39.

Deed from George E. Smith and Elton F. Smith to the Carolina-Tennessee Power Company, dated November 15, 1910, recorded August 8, 1914, 50 acres, as Plaintiff's Exhibit No. 40.

Deed from George E. Smith, et als., to the Carolina-Tennessee Power Company, dated November 18, 1910, recorded December 21, 1910, as Plaintiff's Exhibit No. 41.

Deed from F. H. James, et ux, to the Carolina-Tennessee Power Company, dated July 29, 1911, recorded July 21, 1911, as Plaintiff's Exhibit No. 42.

Deed from Alvin S. (Farrow) Fowler, et ux, to the Carolina-Tennessee Power Company, dated July 16, 1914, recorded Cherokee County July 18, 1914, as Plaintiff's Exhibit No. 43.

Deed from Jesse R. Carroll, et ux, to the Carolina-Tennessee Power Company, dated July 27, 1914, recorded July 27, 1914, as Plaintiff's Exhibit No. 44.

Deed from John A. Green, to the Carolina-Tennessee Power Company, dated July 25, 1914, recorded July 28, 1914, as the Plaintiff's Exhibit No. 45.

The plaintiff next offers in evidence the following contracts to convey land:

Contract from C. T. Roberts to E. F. Smith, dated September 21, 1910, recorded December 26, 1910, as Plaintiff's Exhibit No. 46.

Contract from W. S. Roberts, et ux, to E. F. Smith, Trustee, dated 21st day of September, 1910, recorded December 23, 1910, tracts of land containing 250 acres, as Plaintiff's Exhibit No. 46-A.

S. R. KETCHAM, recalled:

Q. Mr. Ketcham, what amount was paid Mr. Roberts on this contract which I have just read?

A. \$2,018.00.

Plaintiff continued to offer contracts as follows:

90 W. S. Roberts to the Carolina-Tennessee Power Company, dated the 25th day of March, 1911, recorded the 5th day of March, 1912. (This is really the same as that No. 46-A, except one is to the Carolina-Tennessee Power Company, and one is to E. F. Smith, Trustee), as Plaintiff's Exhibit No. 46-B.

Contract from J. M. Martin to E. F. Smith, dated September 20, 1910, recorded the 26th of December, 1910, containing 163 acres, as Plaintiff's Exhibit No. 47.

Contract from S. W. Lovingood to E. F. Smith, dated the 22d of September, 1910, recorded September 23, 1910, containing 80 acres, as Plaintiff's Exhibit No. 48.

Contract from E. A. Voyles, et ux., to E. F. Smith, dated the 22d day of September, 1910, recorded December 22d, 1910, containing 230 acres, as Plaintiff's Exhibit No. 49.

Contract from W. K. Johnson to E. F. Smith, Trustee, dated the 23d day of September, 1910, recorded December 23, 1910, containing 60 acres, more or less, as Plaintiff's Exhibit No. 50.

Contract from Lola Hartness to E. F. Smith, dated September 23, 1910, as Plaintiff's Exhibit No. 51.

Contract from W. P. James to E. F. Smith, Trustee, dated the 24th day of September, 1910, recorded September 23, 1910, as Plaintiff's Exhibit No. 52.

Contract from W. M. Stiles, et ux., Paralee Stiles, et als., to E. F. Smith, Trustee, dated September 27, 1910, registered May 24, 1911, as Plaintiff's Exhibit No. 53.

Contract from W. M. Stiles, et ux., Paralee Stiles to E. F. Smith, Trustee, dated the 27th of September, 1910, recorded December 23, 1910, and in connection with his as Exhibit 53-A or two receipts from W. M. Stiles, as Plaintiff's Exhibit No. 53-A.

Contract from John and J. P. Stiles to E. F. Smith, dated the 20th day of September, 1910, recorded December 23, 1910, as Plaintiff's Exhibit No. 54.

100 Receipt from John L. Stiles to the Carolina-Tennessee Power Company, for \$50.00, dated April 1, 1911; also a receipt from John L. Stiles, on the same contract, dated September 1, 1912, for \$30.00, as Plaintiff's Exhibit No. 54-A.

Contract from T. G. Stiles to E. F. Smith, dated September 28, 1910, recorded December 23, 1910, as Plaintiff's Exhibit No. 55.

Contract between Sarah Stiles and E. F. Smith, dated the 28th of September, 1910, recorded December 26, 1910, as Plaintiff's Exhibit No. 56.

In connection with this we introduce two receipts, one receipt and the other a copy, as Plaintiff's Exhibit No. 56-A.

Contract from C. B. Headrick to the Carolina-Tennessee Power Company, dated March 28, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 57.

The following receipts:

April 1, 1911, receipt for \$40.59; receipt dated March 26, 1912, for \$15.00; receipt dated April 3, 1912, for \$10.00; receipt dated April 3, 1912, \$25.00; receipt dated May 30, 1912, for \$30.00; receipt

dated July 20, 1912, for \$5.00. The total amount of receipts being \$125.59, as Plaintiff's Exhibit No. 57-A.

Contract between W. H. Johnson, et ux., F. E. Johnson and Carolina-Tennessee Power Company, dated April 3, 1911, recorded April 8, 1912, as Plaintiff's Exhibit No. 58.

Receipt dated April 7, 1911, \$51.65, as Plaintiff's Exhibit No. 58-A.

Contract between H. A. Davis, et ux., and the Carolina-Tennessee Power Company, dated March 29, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 59.

Receipt for payment on March 29, 1911, \$11.15, as Plaintiff's Exhibit No. 59-A.

101 Contract between T. A. Davis, et ux., and Carolina-Tennessee Power Company, dated March 30, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 60.

Receipt for payment, March 30, 1911, on that contract, for \$25.30, as Plaintiff's Exhibit No. 60-A.

Contract between W. M. Fair, et ux., and the Carolina-Tennessee Power Company, dated March 28, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 61.

Receipt on last option, dated March 28, 1911, \$66.99; receipt dated April 2, 1912, for \$20.00; receipts dated April 11, 1912, \$10.00, on account; receipt dated May 22, 1912, for \$25.00, as Plaintiff's Exhibit No. 61-A.

Contract between J. N. Stiles and the Carolina-Tennessee Power Company, dated March 28, 1911, recorded on April 5, 1912, as Plaintiff's Exhibit No. 62.

Payment of \$35.50, dated March 28, 1911, as Plaintiff's Exhibit No. 62-A.

Contract between W. M. Hyatt and E. F. Smith, dated October 1, 1910, recorded December 22, 1910, as Plaintiff's Exhibit No. 63.

Contract between W. A. Mashburn, et ux., and the Carolina-Tennessee Power Company, dated April 7, 1911, recorded April 5, 1912, as Plaintiff's Exhibit No. 64.

Two receipts on one date, April 7, 1911, for \$26.00; receipt dated April 11, 1912, for \$25.00, as Plaintiff's Exhibit No. 64-A.

Contract between Tillman Mashburn and the Carolina-Tennessee Power Company, dated March 28, 1911, recorded April 5, 1912, as Plaintiff's Exhibit No. 65.

Receipt dated March 21, 1911, for \$71.03; receipt dated 4-13-1912, for \$25.00; receipt dated May 30, 1912, for \$55.00, as Plaintiff's Exhibit No. 65-A.

102 Contract between W. H. Reece and wife and the Carolina-Tennessee Power Company, dated March 24, 1911, recorded April 5, 1912, as Plaintiff's Exhibit No. 66.

In connection with that contract there are two receipts, one for \$62.40, dated April 7, 1911, and one dated April 11, 1912, for \$25.00, as Plaintiff's Exhibit No. 66-A.

Contract between S. C. Mingus, et ux., and the Carolina-Tennessee Power Company, dated April 3, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 67.

In connection with that contract there are two receipts, one from Mr. Mingus for \$50.74, dated April 3d, 1911, and one for \$30.00 dated March 30, 1912, as Plaintiff's Exhibit No. 67-A.

Contract between H. A. Crisp and the Carolina-Tennessee Power Company, dated March 28, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 68.

In connection with that contract is receipt for payment made by the Carolina-Tennessee Power Company to Crisp, dated April 1, 1912, for \$50.00, as Plaintiff's Exhibit No. 68-A.

Contract between W. B. Raper and E. F. Smith, Trustee, dated October 5, 1910, recorded December 26, 1910, as Plaintiff's Exhibit No. 69.

Contract between W. B. Raper and the Carolina-Tennessee Power Company, dated March 24, 1911, recorded March 5, 1912, as Plaintiff's Exhibit No. 69-A.

Two receipts for payment on it, one is receipt for \$202.98, dated April 3, 1911, the other a receipt for \$25.00, dated April 1, 1912, for \$70.00, as Plaintiff's Exhibit No. 69-B.

Contracts between A. I. Johnson and E. F. Smith, Trustee, dated October 6, 1910, recorded December 26, 1910, as Plaintiff's Exhibit No. 70.

In connection with that there is a receipt for \$50.00, dated October 6, 1910, as Plaintiff's Exhibit No. 70-A.

Contract between B. K. Hall and wife and E. F. Smith, Trustee, dated November 18, 1910, recorded December 30, 1912, as Plaintiff's Exhibit No. 71.

Contract from William Ramsey to E. F. Smith, Trustee, dated November 19, 1910, registered November 19, 1910, as Plaintiff's Exhibit No. 72.

Receipts, one dated 8-16-1911, for \$150.00, and one dated March 25, 1912, for \$100.00 and one dated April 11, 1912, for \$25.00, as Plaintiff's Exhibit No. 72-A.

Contract between W. E. Lovingood, et ux., and the Carolina-Tennessee Power Company, dated April 10, 1911, recorded April 12, 1911, as Plaintiff's Exhibit No. 73.

In connection with this contract is a receipt for \$900.00, dated April 10, 1911, as Plaintiff's Exhibit No. 73-A.

Contract between T. M. Raper, et ux., and the Carolina-Tennessee Power Company, dated August 7, 1911, recorded August 12, 1911, as Plaintiff's Exhibit No. 74.

In connection with this contract is a receipt of payment to him of \$25.00, dated August 19, 1911, as Plaintiff's Exhibit No. 74-A.

Transfer executed by E. F. Smith, Trustee, to the Carolina-Tennessee Power Company, transferring to the PoPower Company all of his options in this County, dated October 4, 1910, and recorded July 1, 1914, as Plaintiff's Exhibit No. 75.

All of the deeds and contracts or options above mentioned, which were offered in evidence by the plaintiff, covered lands lying along, or on, the banks of the Hiawassee River, or its tributaries. Some of such lands lay in the upper basin and some lay in the lower basin of the plaintiff's proposed developments. Some of the deeds and contracts

called for a certain dam site on the Hiawassee River at or near the State line at Appalachia, and for a contour line, or contour lines, a specified elevation above such dam site, and the other deeds
 104 and contracts called for a dam site at or near Beaverdam Creek on said Hiawassee River, and for a certain contour line, or contour lines, a specified elevation above such dam site on Beaverdam Creek.

Records of condemnation proceedings of the Carolina-Tennessee Power Company against George A. Browning and Lilie H. Coit and others, commenced by summons issued June 20, 1911; the petition is signed by Dillard & Hill, Ben Posey and Milton Bell, attorneys, verified by E. B. Norvell, Secretary, filed June 20, 1911, seeking to condemn land in plaintiff's upper basin, Plaintiff's Exhibit No. 76.

Record in the case of the Carolina-Tennessee Power Company versus George A. Browning and Lola Hartness James, et als.; summons issued the 24th day of June, 1911; petition for condemnation filed the 24th of June, 1911; petition signed by Dillard & Hill, Ben Posey and M. W. Bell, attorneys for these petition-s. Verified by E. B. Norvell, agent for plaintiff. The petition proposed to condemn or rather describe three different tracts of land, one containing 20 acres and the other 11 acres, etc., all located in plaintiff's upper basin as Plaintiff's Exhibit No. 77.

Record of condemnation proceedings in the case of the Carolina-Tennessee Power Company vs. George A. Browning and Victoria James, et als. Summons issued 22d of June, 1911. Petition filed on the 22d day of June, 1911, seeking to condemn land in plaintiff's upper basin. Signed by same counsel and verified by the same officer as the other, as Plaintiff's Exhibit No. 78.

Record of the condemnation suit in the case of the Carolina-Tennessee Power Company versus Julius W. Stiles and George A. Browning. Summons issued the 6th day of July, 1911; petition filed the 6th day of July, 1911, signed apparently by the same counsel and verified by Edmund B. Norvell, seeking to condemn land
 105 in plaintiff's upper basin containing 9 acres, as Plaintiff's Exhibit No. 79.

Record of the condemnation proceedings in the case of the Carolina-Tennessee Power Company against Victoria James, Florence Moore and Geo. A. Browning, summons issued the 6th day of July, 1911; petition was filed on the 6th day of July, 1911, signed apparently by the same counsel that signed the other, verified by E. B. Norvell, seeking to condemn land in plaintiff's upper basin, as Plaintiff's Exhibit No. 80.

Summons in the action now being tried, dated the 21st day of August, 1914, as Plaintiff's Exhibit No. 81.

Contract between J. R. Carroll and E. F. Smith, Trustee, dated September 27th, 1910, registered December 26, 1910, as Plaintiff's Exhibit No. 82.

Contract between J. R. Carroll and the Carolina-Tennessee Power Company, dated March 27, 1911, recorded April 6, 1912, as Plaintiff's Exhibit No. 82-A.

Contract between J. A. Green and E. F. Smith, Trustee, dated Sep

ember 28, 1910, recorded December 27, 1910, as Plaintiff's Exhibit No. 83.

One receipt, J. R. Carrell, paid on April 7, 1911, for \$280.00; another receipt from Mr. Carroll for \$25.00, paid to him on the 27th of September, 1910; another for \$50.00 paid April 2, 1912; another for \$50.00 paid April 11, 1912, and another receipt for \$100.00, March 31, 1911, as Plaintiff's Exhibit No. 82-B.

Receipt from J. A. Green, dated April 7, 1911, for \$108.33, payment on the purchase price for land, as Plaintiff's Exhibit No. 83-A.

T. H. VERDELL, sworn for plaintiff, testified as follows:

My name is T. H. Verdell. I am a Civil Engineer and live at Elberton, Ga. I have surveyed for the location and development of water powers in the United States, and have had experience in different engineering and water power works. I was engaged to make a survey of the water powers on the Hiawassee River between Murphy and the Tennessee line, in 1909, by the Amursen Hydraulic Construction Company, and was instructed by them to do this work. I made the surveys and made maps and plat of the survey. The map shown me, marked Plaintiff's Exhibit No. 7-A, is a map of that portion of the Hiawassee River known as the lower reservoir, extending from the State line to West McDonald's property, Laurel Branch in other words. That Exhibit is a copy of the map made by me. There are some property lines on that map that I did not have anything to do with the locating of the property lines. There were no property lines on my map. These broken lines that are on this represent the property lines. Some of my lines are not on this map. My base line is not on this map. The river itself is marked on the plat, being the two center lines, which represent the banks of the river. The outside lines are the contour lines representing the minimum elevation of the storage reservoir. These contour lines are based upon the survey made from the dam site at Appalachia, 150 feet high above the dam site.

Plaintiff's Exhibit No. 7-A which is shown me is a map of that upper section of the Hiawassee River known as the upper reservoir, extending from West McDonald's to the mouth of Hangingdog Creek. The large map on the wall was made by me recently. The point of the Appalachia dam site is right there (witness points it out on the map). I began my survey from the point at Appalachia dam site. There was a place pointed out there to me by Mr. Elton F. Smith where some stakes were driven and there were marks on a tree and my instructions from Mr. Church, he had directed me to this point the one had for a dam site. I began my survey at that point about 1500 feet above the mouth of Cane Creek. The elevation that we took there was about 765 feet above the sea level. Here is the point that was known as the Ogceta dam site just above the mouth of Beaverdam Creek about a half a mile, (witness shows the jury the place on the map). I arrived at Appalachia on February 1, 1909. I began at the Appalachia dam site. I had six or eight men, and sometimes as high as fifteen or twenty. The first

work that I did was to make a little cross-section of the dam site at Appalachia. Then I begun my work up the river by running a base line up the valley of the river and the base line was carried along the level of the river anywhere that I could find easy traveling with my instruments. It was located by stakes driven into the ground, what we call hobs driven in the ground about three feet high which was scalped with numbers written on that and this was the base line and afterwards the level elevations were taken over and it was used in making the maps. The red line running up the river represented my base line, just as the surveyor's line is run; the elevations of these different points were taken and from each one of these points then the contour lines were located, showing the outside extremity of the storage reservoir or pond which would be the outside of the pond or storage reservoir if it should be built to the top of the proposed dam site. Then I ran a line over there to accurately establish the elevation and from each one of these points the contour lines were established. The contour lines represent what would be the top of the water if the dam was built at an elevation of 150 feet. This map is drawn on a scale of 200 feet; the other map on a scale of 800 feet to the inch. Plaintiff's Exhibit No. 7-B was made in my office at Appalachia. The river is accurately laid down on my several plats. We finished the plats, Exhibit 7-B, on the 3d or 4th of June, 1909, and sent them to the Ambursen Company. If a dam was built at

Appalachia 150 feet high, it would back the water one-half a foot at that point at the Beaverdam or Ogreeta dam site at the mouth of Beaverdam Creek. If a dam 150 feet high was

built at the dam site at Beaverdam Creek, it would back up the Hiwassee River just above the mouth of Hangingdog Creek. The water from the lower dam would be backed up the river about 12 miles. My recollection is that the two dams would back up the river about 24 or 25 miles. I first laid out my base line, then established the levels of each point along where this base line ran; then from each one of these points I measured out and established my contour line on each side of the river for the purpose of ascertaining what area of land would be embraced within the storage reservoir. My reason for wanting to know that was that we had to know the amount of land in there before we could estimate the proposition. We had to know the storage capacity of the river before we could calculate how much water we had before we could know the out-put of the power. We had to know the storage capacity of the upper section before we could calculate what the draw-off would be, and we were obliged to know that before we could know how much head we would need. On Plaintiff's Exhibit No. 7-B, the dam site at Appalachia is indicated. It was put there in 1909. The stadia points leading out from the base lines on the river were various distances apart, anywhere from 100 to 1000 feet; they were on an average of about 500 feet apart. I set out 303 of these stakes. The elevation along the river was marked on bench marks, which were usually on trees at an average of a mile and a half or two miles apart. We were especially careful with the location of the base line, because the contour line depended on it. Bench marks were located for permanent marks. The sur

vey of the lower basin was sufficiently accurate to make what we would consider as an average amount of water stored in a dam 150 feet high at Appalachia. This survey of these proposed works was made in the usual and ordinary way that such surveys are made. Relative to my examination of the dam site at Appalachia, I will say that we ran a line, the cross-section of the dam site beginning at the elevation on one hill and running down across the river running out the same elevation on the other hill. Then on each side of that line I went out 50 feet and put in another and had three lines on each side 50 feet apart; then as we went up the hill we put in these lines ten or twelve feet apart, making what you would call a check, double row of lines, these lines running this way with a peg every twenty feet up; took the elevation on each side and platted the contour line on the ground from there; then on each side of the river, my recollection is, I took eight soundings on each side for the purpose of ascertaining something about the foundations, how deep it was to rock. Some of the soundings went as deep as 27 feet; some struck rock near the surface of the ground. Some one else had already uncovered some of it and done some sounding on the east side of the river and it made my work some lighter than it would have been. I took out the various material that I found in these holes, that I called sound rock and sent samples of it to the Amursen Company, together with these profiles. This is a profile of the dam site at Appalachia, showing the hole on the west side looking up the stream from the bottom of the river from the hole up this way. I just drew it like the dam would look if you looked up the river facing the ground. This shows the ground as it lay with the formation and creases or ravines of the rock I saw on the ground and the soundings and so on.

Plaintiff introduces, as Plaintiff's Exhibit No. 7-C the cross-section of the dam site at Appalachia. The witness Verdell then continued:

My level man, Mr. Herndon, took twenty-six days to get the levels over these hills. I spent a day there myself doing instrument work. I had four or five of my men there for probably five or six days doing the sounding. I used a churn drill and reported the result of my investigations. At Beaverdam Creek I only cross-sectioned the dam site for the purpose of establishing the contour lines; I did not examine the ground because most the way up solid rock was showing. I made a report of that work. Stakes showing the contour lines were put at every break of the hill, probably twelve or fifteen hundred stakes on the whole line, on both sides of both dams. For these contour stakes a good solid stake would be used, and that would be marked with the same number as the stadia point, the first point A, the second B, and the third C. All of these stakes carried the same number as the stadia point and that was carried out throughout the entire length of the proposed development.

Plaintiff offers certain maps in evidence as original maps, covering the upper basin, marked Plaintiff's Exhibit No. 7-D.

The witness Verdell then continued:

I began the actual field work about the first Monday in February of 1909 and was at work until about the last week in May. I was paid for my work by the Ambursen Company at the rate of \$200.00 a month and my expenses. The work that I did was necessary to form an accurate estimate of the cost of development or the out-put of power. I made investigations of the flow of the stream. I established a gauging station at Hamby's ferry and took the measurements of the flow of the stream there for four or five different days; I then went down to the Government Gauging Station at Reliance, about 25 miles away, and investigated that point. I then wrote to Washington City to the Government hydrographer and got the report of the stream for the same days that I had taken the measurements at Appalachia, and by comparing these with the Government report I found that approximately 90% of the water at Reliance passed Appalachia. In other words, from the report at Reliance, take 90% and you would have the report for Appalachia. The Government report covered a period of from fifteen to twenty years. I did not make any calculation of drainage area. I made an approximate estimate of the horse-power on the information that had been given me about the river. My estimate for the two dams was forty to forty-five thousand horsepower delivered on the switch board every ten hours. In making my survey I saw other locations of dams or dam sites that were suitable. I made a survey of a dam site at West McDonald's and another near the Whitaker-Reed property and one on the Plemmons property. There are dam sites along the river. The red spots on the map represent the property purchased by the Carolina-Tennessee Power Company. I put them on there from the information furnished me by Mr. Powellson.

The Plaintiff here offers linen map marked Plaintiff's Exhibit No. 7-E, copy attached.

The witness Verdell then continued:

The branches and small streams running into the Hiawassee River are indicated on Plaintiff's Exhibit No. 7-E.

The Fowler land shown on the map in red covers about two-thirds of the land the plaintiff owns in that section. If the plaintiff did not own the Green property and the Carroll property it would not own anything from the Mashburn land to their upper basin. I do not know when they purchased or condemned these lands.

Cross-examination:

I am not a dam constructor. I never did any work for the Ambursen Company in the actual construction of a dam.

The map on the wall shows that the Power Company does not own the Extract Company's land on the north side of the river at Appalachia. The Company could not have built a dam and closed the flood gates at Appalachia until they had that land. I surveyed and cross-sectioned two dam sites. I did not know which one they were going to build. Near the Beaverdam site I surveyed

two dam sites, one above and on below the Beaverdam Creek. They proposed to use the one above Beaverdam Creek. They have proposed to use it for the last eight years. I did not know if this dam site was going to be built out of concrete or masonry, the dam at Appalachia. That was a matter to be settled at the Boston office. In placing our contour stakes we had to see from one contour point to another and we cut that out but we did not cut around it.

RICHARD HAMBY, sworn for the plaintiff, testified as follows:

I live in the lower end of Cherokee County. I know Mr. T. H. Verdell and worked with him on the Hiawassee River on a survey for two or three months in 1909. I carried the rod. We began near Appalachia at the so-called dam site there and worked up to near Hangingdog Creek. There was five or six rod men. We set a stake every time that we platted a route in certain places. The base line was staked out up the river. The collateral lines on the branches of the small streams were staked out. The stakes were about three feet high and an inch thick. There was a contour line I reckon that ran around the hill where the water would be; we set stakes there.

Cross-examination:

These stakes were cut off of trees, and made out of anything that would make a stake. It has been about four years since I have been up and down this river. I don't know anything about these stakes now or whether any of them are there now or not. I do not know how long they lasted.

Direct examination:

When I went back along down the river I saw some of these stakes in the base line; they looked like they did when we put them there. Any one could see them; they were scalped and marked.

J. D. McBRAYER, sworn for the plaintiff, testified as follows:

My name is J. D. McBrayer. I live three miles above Appalachia. Mr. Verdell and his crew, when surveying, boarded at my house. I saw them surveying and putting down stobs up and down through the fields and around on the hill-sides. They were known as contour stakes. I saw some of them last summer. They were kind of fallen over; I noticed a couple. I have seen stakes along on these lines, the base lines, for three or four miles up and down the river.

Cross-examination:

The stakes that I saw last summer were lying on the ground. They had fallen over, and they had rotted off. They were the same stakes that Mr. Verdell and his men put there.

P. H. WILLIAMSON, sworn for the plaintiff, testified as follows:

I live in the western part of Cherokee County. Prior to five years ago I lived up on the river. At the time that Mr. Verdell made his survey I was living on the Hamby bend. I saw the surveying party. They were on the Lenderman place I think, the north side of the river and they were putting up pegs and marking them as
 114 well as I remember. There might have been five or six of them. The stakes were two to three feet high and three inches in width. They were put up some distance from the water. I noticed some marks or figures on the stakes.

JOHN GREEN, witness for the plaintiff, testified:

My name is John Green. I am 75 years old. I live out about 8 miles from Murphy; have lived in Cherokee County nearly all my life. In 1909, I had some land down on the Hiawassee River. I had a deed for it. I sold some of my land to Carolina-Tennessee Power Company—50 acres. It was located along the Jake Davis land, and around to the Jesse Carroll land. It extended up the river. I sold them where the water would cover the contour line, up to the contour line. (Witness points out on the map where the land lies.) I sold them this land here from the Jesse Carroll land, running around to the Jake Davis land in the bend of the river, about two miles or a little over. The land joined Jesse Carroll on the South and Jake Davis on the North. The strip of land I sold was two miles along the Hiawassee River, probably a little over two miles. It is above Beaverdam Creek. Before I made the deed to the Carolina-Tennessee Power Company, I gave Mr. Smith an option in 1910. I believe they called him Fred Smith. At the time the option was given, \$5.00 was paid to me by Mr. Smith. I contracted to sell the land for \$1950.00. Mr. Powellson paid me the remainder later on. He did not pay it all then. I can't remember exactly when the next payment was made to me, after the first \$5.00. They paid me \$106.00 or \$107.00 at one time. I don't remember the exact date of the payment. I think it is something over \$100.00. I believe that was on April 7, 1911." (Being shown receipt witness said "Yes, that is the receipt for \$108.33." Receipt was dated April 7, 1911. Witness further testified, "\$50.00 was paid me later
 115 on by Mr. Smith. I don't remember the exact year. It may have been about 1912. After that there were other payments made. When I contracted it to the Carolina-Tennessee Power Company Mr. Powellson made me a payment. He paid me the balance due on the purchase price for this land and I made a deed to Mr. Powellson or the Carolina-Tennessee Power Company. I sold land to Mr. Powellson or the Carolina-Tennessee Power Company under the original option or contract made with Mr. Smith under the same contract. The purchase price that was paid to me was the balance of the purchase price that was agreed to be paid to me by Mr. Smith. Mr. Powellson paid me \$1000.00 down when I traded with him. It was on the 25th day of July, 1914. He gave me a note for the remainder that was behind. The mortgage was

for \$795.00. At the time the deed was made Mr. Powellson said I might remain in possession until they needed it, and I told him I would give it up. When he needed it for water power, they would build a dam below, and when it flooded the land they were to have it any time they needed it. I have remained in possession ever since. The mortgage was executed on the date they paid me the \$1000.00. The trade I made with Mr. Powellson was a straight trade and I made them a deed. No, sir, there was no fraud about the trade. I got my money and there was no sham about it. I was down on the Hiawassee River during the year 1909. I saw Mr. Verdell and his associates across the river from my property. I think they were on Mrs. Whitener's property. Looked to me like they were setting stakes. I saw some stakes on my property. I saw maybe one or two on Jake Davis' property, and I saw one or two on the Hedrick land, and I think I saw one on Jesse Carroll's property. I saw stakes on the property of two or three different people besides my own. They were about 3 feet high; about as large as a chair post, maybe a little larger—kind of flattened and had figures on 116 them. They were set up just one side flattened and figures on one side. They were pretty solid-like, driven in the ground. The stakes on my ground were up and down the river along, not far from the river where I saw them on Mr. Davis' land. It is along the line referred to as the base line. I expect I saw the stakes two miles, probably a little over, along the river. I saw them on Mr. Davis' — on the base line, just above my land, and I saw one on Mr. Hedrick's land up the creek from the river. I think I saw one stake on the hill on my property. It looked like it was pretty close about where the contour line was to be. I have been back on my property several times since 1909. I saw some of the stakes when I was back there. They were standing looked like in the very same place. I may have seen them 4 or 5 times, when I have been up and down the river. I saw them off and on for two years. I saw them over two years after the survey, passing up and down there. They were standing. They were not a great ways from the river. They had trimmed a row along, sort of opening, some distance from the river. They trimmed out a sort of opening so they could see to survey. The last time I saw the stakes on my land was about the year 1911 or 1912.

On cross-examination the witness testified: "On September 28, 1910, I gave Mr. Smith an option. That was the first contract I had with them. The \$5.00 in cash was paid then. The \$200 called for in three months was not paid at that time. The \$870.00 called for in 12 months was not paid at that time. The \$875.00 called for in 18 months was not paid at that time. I believe the \$50.00 payment was made in September, 1911. I don't exactly remember the date that it was paid. I didn't keep a memorandum of it. I read the contract before I signed it. I don't know that I would 117 have given the contract if it had not had the clause that it was to be void if the payments were not made when due. I sold the land to Mr. Powellson in 1914. Mr. Smith had made some

payments, and I did not know whether the contract held good or not. I made an option on the 12th of April, 1912, to L. E. Mauney on the same property. I reckon if Mr. Mauney had carried out his option I would have given him a deed. I never optioned any land to Mr. McMullen. I never made an option to McMullen. I don't remember just how many stakes I have seen on my land. I don't remember whether I saw more than three or four or not. The frontage on my land would be about two miles along the river. I believe I saw only one stake on Davis' land; just one on Carroll's land. I saw one on Hedrick's land. They were more than 30 or 40 feet from the bank of the river, except the one I saw upon the mountain. Those along the river were not set 160 feet back. I saw some stakes up and down the river, where they had trimmed out an opening to survey. Mr. Norvell read the deed to me, which is dated July 25, 1913. The clause in the deed reading as follows 'being the same land contracted to be conveyed by J. A. Green to E. F. Smith, Trustee, September 28, 1910,' was explained to me by Mr. Norvell. He went on and explained about the deed. I don't remember that he said who he put that clause in. Mr. Powellson was here when I made the deed. Mr. Powellson paid me \$1000.00 and gave me a note and mortgage for the balance. I think Mr. Powellson drew the deed. I am not sure which one, whether it was Mr. Powellson or Mr. Norvell drew it. At that time neither Mr. Powellson nor Mr. Norvell told me that the Hiawassee River Power Company had started a condemnation suit against my land.

On redirect examination witness was shown the deed and identified it as being the deed he made at the time he made a trade with Mr. Powellson and testified—"That is my signature; that is the only deed I made for this 50 acres of land. The deed was made to the Carolina-Tennessee Power Company. Mr. Powellson was doing business for them. The deed was made to the Company, and he was managing the business for them, was my understanding. During the time the option or contract was in force after the payments were made, until I made the deed, I thought probably his making the payments along held the option good. I never drew up a deed and tendered it to Mr. Smith and demanded my money on the contract. Mr. Mauney lived in East Murphy. He was taking the option for Adams. His option was dead when Adams found out he was going to have a law suit; he said he would just draw out and quit. He never paid me. He paid me nothing only what he paid when I first gave the option."

On re-cross examination, witness testified—"Mr. Adams said he did not want to have a law suit about it. He found out he was going to get in a law suit, therefore, he quit. He said life was too short to have such law suits and he would just quit. Mr. Mauney said he did not think Mr. Smith was going to do anything, and I didn't know, and I found out later that he was."

J. R. DEAVER, sworn for the plaintiff, testified as follows:

My name is J. R. Deaver. I live twenty miles from Murphy down on the Hiawassee River. I live below Beaverdam Creek, about five miles from Appalachia. I saw Mr. Verdell and his surveying party when he was making a survey in 1909. They were on my land. I had three-quarters of a mile river front on the land. I saw them driving up some stakes with figures near the top. I saw them doing this also on Mr. McNabb's land. I saw 119 stakes driven along the base line and several along the contour line. I saw some of these stakes not over a year ago standing there. I gave Mr. Smith an option; the option ran out and we made a trade without an option. Mr. Fred Smith and I made the trade. I gave him a deed for the land and he paid me in cash \$600.00. I made a deed to the Carolina-Tennessee Power Company; the deed was dated November 10, 1910.

JESSE CARROLL, witness for the plaintiff, testified as follows:

"I live in this County, near Nottley River. I lived on Hiawassee River up to two years ago last fall. I lived about 8 miles below Murphy at the mouth of Persimmon Creek. I owned some land there. It joined the land of W. A. Fain, and the land of John Green. I guess I had about a mile and a quarter fronting on the Hiawassee River. I made a contract to sell the land to the Carolina-Tennessee Power Company. It was in the year 1919, along in September."

Witness' attention was called to Exhibit No. 82-A and he stated that that was the option he made to Carolina-Tennessee Power Company and further stated "That is all the one I made. I afterwards made a deed to the same company. I was paid for the land, but not exactly in accordance with the terms of the option. I made the deed to the Carolina-Tennessee Power Company in the year 1914. After I made the option I was paid some money before I made the deed. I was paid \$280.00 April 7, 1911; \$25.00 September 27, 1910; \$50.00 April 2, 1912; \$100.00 April 11, 1912; \$100.00 March 31, 1912. At the time I made the deed I was paid \$3,000.00. Mr. Powellson and Mr. Norvell were present when the deed was delivered. I was paid \$3,000 at that time. I was not paid all of the purchase money, and they gave me a note for the balance. At the time the deed was made, the previous payments were deducted from the \$3,000.00. I had made the previous option on the land 120 to Fred Smith, before I made the one to the Carolina-Tennessee Power Company. I saw a few stakes on my own place; the surveyors put them up there. I saw several pine bushes blazed and marks upon them; also figures."

On cross-examination, witness testified—"The deed was made July 27, 1914. At that time they were to pay me \$6,000.00 for my land—\$3,000 in cash, and the balance on time, with a credit for what they had already paid. I don't think they gave me a mortgage on

the land. At the time the deed was made, Mr. Norvell read to me the clause in the deed as follows 'and the same is made in pursuance to, and for the purpose of carrying out said contract.' I don't know why they put that in the deed. The deed was read to me at that time.

T. C. KILPATRICK, sworn for the plaintiff, testified as follows:

My name is T. C. Kilpatrick. I formerly lived about a mile from the Hiawassee River, three or four miles above Appalachia, on the south side of the river. I sold my property on the river to the Carolina-Tennessee Power Company. I do not know where the survey of the flood line was made across my property by Mr. Verdell. I was not over there. I don't remember seeing any stakes there. I never saw a surveying party. My land extended about a quarter of a mile along the river. I think I saw some stakes on Mr. Hamby's land, on the south side of the river. The Carolina-Tennessee Power Company paid me \$100.00 for my land.

K. W. SHEARER, sworn for the plaintiff, testified as follows:

My name is K. W. Shearer. I live about 20 miles down the Hiawassee River in the lower end of the County, about five miles above Appalachia, on the south side of the river. I sold some lands to the Carolina-Tennessee Power Company. I was living at Duck-
121 town at the time Mr. Verdell did the surveying. I don't remember ever seeing any stakes; I did not look for any. The Company paid me \$220.00 for my land. I had about a mile of river frontage.

J. E. SHEARER, sworn for the plaintiff, testified as follows:

My name is J. E. Shearer. I live on Persimmon Creek at a place called Guy. I lived on the Hiawassee River three and a half miles above Appalachia. I sold my land to the Power Company for \$2,300.00. I had about a half of mile of river frontage. I saw Mr. Verdell and a surveying party in 1909, one day; they were on my place. They were carrying a rod and some fellow was driving pins on the contour lines. I remember three stakes on my land.

E. B. NORVELL, sworn for the plaintiff, testified as follows:

My name is E. B. Norvell. I live at Murphy, North Carolina, and I am an attorney. I was present at the annual meetings of the stockholders of the Carolina-Tennessee Power Company in 1910, 1911, 1912, 1913, 1915 and 1916.

The plaintiff offers the minutes of the annual meetings of the stockholders of the Carolina-Tennessee Power Company, dated January 17, 1910, as Plaintiff's Exhibit No. 84. Copy hereto attached.

The plaintiff offers the minutes of the annual meeting of the stockholders of the Carolina-Tennessee Power Company, dated Jan-

uary 16, 1911, as Plaintiff's Exhibit No. 85. Copy hereto attached. Plaintiff next offers the minutes of the directors' meeting of the Carolina-Tennessee Power Company, held February 4, 1911, as Plaintiff's Exhibit No. 86. Copy hereto attached.

The plaintiff introduced the minutes of the annual meeting of the stock-holders of the Carolina-Tennessee Power Company, held at Murphy, North Carolina, on the 15th day of January, 1912, as Plaintiff's Exhibit No. 87. Copy hereto attached.

The plaintiff introduced the minutes of the annual meeting of the stock-holders of the Carolina-Tennessee Power Company, dated January 22, 1912, as Plaintiff's Exhibit No. 88. Copy hereto attached.

The plaintiff offers the minutes of the meeting of the Board of Directors, dated February 14, 1912, as Plaintiff's Exhibit No. 89. Copy hereto attached.

The plaintiff offers the minutes of the stock-holders meeting of the Carolina-Tennessee Power Company, dated January 20, 1913, as Plaintiff's Exhibit No. 90. Copy hereto attached.

The plaintiff introduced the minutes of the meeting of the Board of Directors of the Carolina-Tennessee Power Company held on January 26, 1913, as Plaintiff's Exhibit No. 91. Copy hereto attached.

Plaintiff offered the minutes of the meeting of the Board of Directors of the Carolina-Tennessee Power Company, held on July 21, 1913, as Plaintiff's Exhibit No. 92. Copy hereto attached.

The witness Norvell then continued:

I have acted as attorney for the Carolina-Tennessee Power Company from its organization in May, 1909, until sometime in October, 1913, and then again from sometime in the early part of February, 1914, until July, 1915, and again since last November up to the present time. I drew deeds and contracts and did other things that was the duty of an attorney. I paid out a good deal of money for them. After the organization of the Company I employed Messrs. Billard & Bell and Mr. Ben Posey as attorneys for the corporation and to attend to such legal duties as they might be called upon to attend to. I was busy in the office attending to the office work and abstracting titles in the Register of Deeds' office in 1909, 1910, and 1911, and during the years 1910, particularly, and 1911, taking contracts, drawing contracts and drawing deeds, investigating titles and such other duties as may have fallen upon me. I am familiar with plaintiff's exhibits Nos. 7 and 7-A. (Maps of the property and the lower reservoir of the Carolina-Tennessee Power Company, property maps.) The map for the lower reservoir came to my hand about July 23, 1910. The map of the upper reservoir, as I remember, was received on the 29th of September, 1910. I have a letter before me that I wrote on the 29th of September, 1910, acknowledging receipt, saying it came to my hand during my absence. The upper reservoir map has some corrections in red ink, one in red ink in regard to the James land and one changing the name of Farrow to Fair in red ink. The one of

the lower reservoir has a correction where it says, as I remember now, Jake Robinson which was changed to Jehu M. Robertson. I find that the map I have in my hand for the upper reservoir has a correction on it in regard to the James heirs and Florence Moore written in red ink, and the name W. A. Farrow stricken out and W. M. Fair written in in red ink. These names were written there after they were received, after this map was received. The map of the lower reservoir has a correction on it where Jake Robertson is stricken out and Jehu M. Robeson is written in the place of it. These maps were used in my office until the 21st of June, 1911, when they were deposited with the Clerk of the Superior Court by Mr. George E. Smith, Vice-President of the Carolina-Tennessee Power Company, I being present when they were deposited. As to what happened when these maps were taken into the office of the Clerk of the Superior Court and what was said as near as I recall—as near as I recollect, Mr. Fain, the

clerk, was told that the charter of the Tennessee-Carolina
124 Power Company, as we considered it, required these maps to be deposited in his office before the Carolina-Tennessee Power Company could begin condemnation proceedings; that we were then contemplating bringing some condemnation suits, and might have brought one, and they were left there for that reason, together with the instructions of the Secretary and Treasurer of the Carolina-Tennessee Power Company to be deposited. Mr. Smith and I then went out and left the maps there. I did not notice as to whether any notations were made on the maps. I left them with the clerk. As to when I next saw the maps, I will not be positive as to date, but some days after that the maps were borrowed from the clerk and were used in my office and, as I understand, they were then subsequently returned to the office of the clerk; I do not remember positively. They were used at my office for a time. Sometime later we got other maps but I cannot recollect when. The clerk was told that we were required to deposit them there as a part of the records of the office; I don't know what he did with them afterwards, whether he marked them filed or not. We deposited them in compliance with the charter. What I have described as depositing the maps in the clerk's office was in the morning and Mr. Fain, the clerk, was in the office at work, sitting at his desk; the maps were laid down on the left hand side of him and he was told that they were deposited there in compliance of the charter of the Carolina-Tennessee Power Company, and that we contemplated bringing some condemnation proceedings and had to file them before bringing the suits. I do not recollect how long they stayed there then or when they were carried or taken out of there, or when I got them again, but sometime subsequent to that I got the maps again, the second time. I said they were borrowed. Mr. George E. Smith borrowed them and I borrowed them the second time and took them to my office and used them for the purpose
125 of drawing some deeds and contracts. Often we would not have the descriptions by metes and bounds, and I would draw the contracts, the description in the contracts according to the contour lines laid down here. For instance, beginning on such a tree on the bank of the river and running the property line of A and B, to the

contour line so many feet away to a certain point up and down the river with the property line of C and D, then down the river with the meanders or thread of the river to the beginning, and we could not put the correct description in the contracts and deeds without these unless we had the metes and bounds. I used them in my office that way and kept them on my desk. Another set of maps came and Mr. Smith kept these in his office and in July, 1914, I returned these maps to Mr. Fain's office, I don't remember what day in July, but it was after the 15th of July, but I don't remember what date; and I would not undertake to state what day it was, but after the 15th of July I gave them to Mr. Fain and told him that day that they had been filed. In October, 1914, after I returned from New York, I was called to New York on some matters connected with this Company. When I returned to Murphy I went to the Clerk's office and told Mr. Fain that I had found two letters that corroborated my statement to him in July that the maps had formerly been filed in the office, and that I wanted to see the maps and have the privilege of coming up there with two maps I had in my office and putting some corrections on these, as I stated awhile ago appear in red ink, and he told me that I could do so and I put them back in the vault in the Clerk's office. I think the next time that I saw the maps was one morning in April, 1915, when you and Mr. Duer and I went into the clerk's office and asked to see the maps. They were there then. They were shown to us. The previous trial of this case was held at

that time of court; it was just before the trial. In the latter part of July, 1914, between the 24th and 27th of July, 1914,

Mr. Duer asked me where these maps were and I informed him that they were in the clerk's office or should be there. In April, 1915, when you and Mr. Duer and I went in there and asked for the maps, they were on the shelf where the books and records are kept to the right of the vault as you go in there about, I should say, twelve or fifteen feet down from the door, right about midway of the shelves, where they had been since July, 1914,—about the same place, that is, where I saw them laying. I examined for the Carolina-Tennessee Power Company the titles for most every tract of land from the point north of Hangingdog to the State line, as far as I could find them. I will state what I considered bad titles, considered and reported to the Company as being defective titles. Now, we will go up the river, here is Ed Taylor's land which does not lay on the river, but is up the branch, I don't remember the name of the branch. I was never able to find any title to that, sir; he might have it. On the 31st day of October, 1910, this letter, I am refreshing my memory from a letter I wrote for Mr. Elton F. Smith. He was present and signed his name and addressed to Ed Taylor, telling him to bring his title papers up that I could not find his title. He never came. That was on the north side of the river just east of the Hamby heirs land. The Julius Reed tract of land adjoining the land of Lenderman, as I see it from here, on the north side of the river, I was not able to find a scratch of a pen for it in his name, or any one he claimed under. I think that was one of the tracts for which the Company had a contract. I know I turned his title down. The W.

M. Mashburn land, that is on the south side of the river opposite to Anderson Coleman's land; there is not a scratch of a pen on record nor in his name for it. He may be able to hold it by possession, and

I could never get him to get us any papers. We paid him
127 several payments on it, and we finally refused to pay him any more until he would do something about it. Then the

Williams Hyatt land on the north side of the river; I have never been able to get the title to that straightened out. The land was rented to one Roland. We finally got that from one of the heirs although after writing several times I could never get him to do anything further towards straightening out the title to his land. Only nominal payments were made to Hyatt; he would not do anything. The Henry Reece land we straightened the title so we had a bond for title from his father to W. M. Hopkins, Commissioner. I do not say it was not recorded but I do not think it was and he had the notes paid showing the payment of money and I straightened it out by getting the land embraced in the option here among the Thomas heirs, and got Mr. Reece's title straightened out. I think I think two payments were made to Mr. Reece; I think \$80.00 or \$85.00 was paid to Mr. Reece; I would not be positive about that. The Martin land, I could never locate it by any description whatever that is of record. For instance, beginning on a turkey oak, it did not say where the turkey oak was and running so and so without any possible way of connecting it. Although I called Mr. Martin's attention to the defect in his title time and again, I could never get him to do anything with regard to straightening it out, and finally we had to bring a suit for condemnation proceedings against him. He also contracted to the Carolina-Tennessee Power Company the piece of land embraced or shown here as the Burgess heirs' land. Their title was in such a condition that we refused to pay him anything on it. The old man Burgess had entered the land, and had it surveyed and transferred his survey to G. G. Whitcomb and G. G. Whitcomb died and his wife transferred the certificate to Martin, and Martin got a grant on the land. Jake Burgess, son of the elder

128 Burgess, was claiming the land as an heir of his father, and either had begun a suit against Martin or was filing a suit. I would not be positive. This was brought to Mr. Martin's attention and he would not straighten it out. That was the condition of the title and we did not feel justified in paying any money on it. I do not recollect about the Fair title, but we paid William Fair several payments. I would like to refresh my memory and see about defect to his title. I am speaking now principally from memory, but I think I am correct. Whenever I found any defect in a title. I called it to the attention of the parties who claimed the land and did everything I could to aid them in straightening their title, and always refrained from bringing condemnation proceedings or to harass them in any way, and gave them time to get their titles straightened out if they could—I reckon Mr. Fair's title is straight. There was a payment of \$50.00 made to Mr. Fair on December 30, 1910. I then entered here on the cash book paid William Fair on the 2d day of April, 1912, \$20.00; on October 11, \$10.00, and on the 22d

of May, \$25.00. I don't know whether any more was paid or not. Then we come to Joe Whitener's property; I don't know whether this is Joe Whitener's property or whether this is the piece opposite John Stiles and below the H. W. Rogers property, or the one adjoining the Henry Whitener property a mile or more above. I don't know whether this is the piece of property or not, but I have never been able to find a grant on any land in Joe Whitener or any one that he claims under. I am inclined to believe that his title might be good by adverse possession, if he has been in possession of it. I take it that he calls for the river. I don't think or I don't know whether he would have any possession or not if he had no deed; they are mighty honest old men and they wouldn't want to do anything wrong.

Then we come to the H. W. Rogers property, I could not speak of that unless I had my books. The Mary Rogers and Q. W. Stiles; I could never find anything for that land unless it be that that is a piece of land that they bought from the C. T. Rogers heirs. I refused the S. W. Lovingood tract. Mr. W. S. Roberts' title was good; I paid him \$2,000.00 on it, \$1,000.00 in 1911, and \$1,000.00 in 1912. I am a director of this Company and have been since 1912. Up to the middle of October, 1913, I was active in looking after the Company's interests, making payments on these contracts, investigating titles, trying to get people to get their titles up, and I listed their land for taxes, made payments for them, etc. I had something to do with procuring an amendment to the charter of the Company in 1909. We paid the State Treasurer \$950.00 for the amendment at that time. It was incorporated first for \$250,000.00 and we increased the capital stock to \$5,000,000.00 and as I remember now, we paid \$100.00 and then \$900.00 on February 1, 1909. I have not it entered franchise tax to the State Treasurer \$100.00, August 1, 1909, additional tax \$950.00. This franchise tax was charged when I introduced the bill in the Legislature. I did not have entire charge of the Fowler transaction. Mr. Hickey was negotiating with Mr. Fowler for a month or six weeks before we paid him the money. I saw Mr. Fowler twice in the meantime. He is dead now. We arranged for him to come here on the morning of the 16th of July, 1914, to execute a deed to the Company. On the morning of the 16th of July he came to my office and in the meantime I had abstracted the title to his property and had it straightened out, and he came in my office and I drew a deed to the Carolina-Tennessee Power Company and took him before Mr. Bailess, a Notary Public, and executed the deed in the bank before Mr. Bailess, and I paid him \$15,000.00 by checks, signed by myself and Mr. Hickey, on the Bank of Murphy, and I stood there and saw the check cashed, in this way, he took certificates of deposit from the bank; that was his business, and I then brought the deed up to Mr. Fain. It was then that I learned that the Hiawassee River Power Company had begun proceedings against Mr. Fowler. There were no articles of incorporation of the Hiawassee River in the clerk's office at that time. That was on the morning of the 16th day of July, 1914. The trade had been made before that, the price agreed upon; all we had to do was to execute a deed and

turn over the money. We had consummated the trade on Saturday before and the agreement was made for him to come here on Thursday and execute the deed. It was nearly a week before. At the time I paid for this property I did not know there were any such proceedings brought as I have referred to. After I filed the deeds in the Register of Deeds' office, I went back and searched to see if the articles of incorporation were on file, and I could not find any. They did not come until that night. The articles of incorporation were issued from the Secretary of State on the 15th. The way I found out about it, when I took the deed to Mr. Fain he told me the Hiawasse River Power Company had brought condemnation proceedings against him. If the articles of incorporation were issued from the Secretary of State's office on the 15th and mailed before four o'clock, if the schedule was the same as it is now, it could have arrived by three o'clock in the afternoon of the 16th. That was after my deed had been filed. I think if you will refer to the deed it will show. It might have come on the night of the 16th; the next mail could bring it. As I remember the schedule, it would leave Raleigh at four or five o'clock, and if my calculation is right, arrived here by 3:05 the next afternoon, or leave Raleigh at 1:30 in the morning and arrive here between nine and ten o'clock that night. As well as I remember now, the money that I got to pay Mr. Fowler for the land had been in the bank several days to the credit of Mr. Hickey and
 131 myself. I have got a telegram; I cannot put my hand on it now, but could go to my office possibly and find it, that this money was sent for this particular purpose, for buying Mr. Fowler's land. It was in the bank several days before the 16th. I received the money from the Carolina-Tennessee Power Company, through its President. I do not know whether the telegram was signed by the President or not. We usually did the correspondence by using the name of the President. The money was sent direct to the bank of Murphy from the New York bank by its correspondent, and I was notified and when my check was presented it was honored. There is one thing I overlooked and that is the impression I made about the trade. I want to state that I said that I thought that the trade had been finally agreed upon the Saturday before; I am mistaken about that since refreshing my memory; it was some days before; I reckon it was two weeks before that that Mr. Fowler came here and went to Mr. Bell's office for Mr. Bell to represent him. He was ready then to make the deed. The money had been there for some time, but I found that one of the children of his sister, the land came through his father and his mother, and two of the children of his sister live in Georgia and they had to make a formal deed to him and these deeds I thought as a matter of protection had better be secured. The trade was closed on the 16th, the money was paid on the 16th, but the land was bought before that some time.

Cross examination:

I was a stock-holder of the Carolina-Tennessee Power Company after the first of January, 1912. I have five shares now, five shares of stock now. I am not a stock-holder of the Carolina Construction

Company. I was not present at a meeting of the stock-holders of the Power Company in 1914. I severed my connection with the Company about the middle of October, 1913, and took up my connection again in February, 1914. In the meeting of the stock-holders of January 17th, 1910, Elton F. Smith was the only stock-holder that was personally present. I was acting as proxy for stockholders. All that was done at that meeting was to elect officers for the next year and inspectors of election. The minutes of the meetings were first drawn in rough in my handwriting and sent to New York and there written up and I signed them. I was present at the stock-holders' meeting in 1911; there was no individual stock-holders present. The minutes were written out here and sent to New York to be typewritten and sent back to me. At the annual meeting of the stock-holders in 1912, Mr. George E. Smith and I were present; the others were represented by proxy. At the 1911 meeting nothing was done except to elect directors. Nothing was done at the 1912 meeting except to elect directors and inspectors of election. In the 1913 annual meeting of the stock-holders, no stock-holders were present except myself. Nothing was done except to elect directors and inspectors of election. The reason why the Company did not buy a good many tracts of land was that the titles were defective. In December, 1910, I wrote to several of them that if they would come and straighten out their title, they would get their money and they did not come, and some have not come yet. The Company got out of money; it got in financial straits, but I don't give that for the reason for not buying the land at that time. The Company had plenty of money at that time. It furnished the money in 1910. In 1911, Mr. E. F. Smith, the real estate man, died. I was away from here in Raleigh, and a man by the name of Brown, an adventurer, came in here and undertook to throw discord among the people and it caused us some trouble and it worried us and we continued to pay some money all through 1911 and up to as late as I remember, as June, 1912, to the people to whom we owed money, except those who did not have any title, and a few of them were not contentious about it; they were living on their lands; we had not taken their land from them and were not molesting them, and the majority of them were satisfied. In 1912 the Company was in pretty bad financial condition. This continued until September, 1913. In 1913 arrangements were made by which they had all the money they wanted to carry on the business with. These arrangements were made with Mr. Powellson, Bretane, Griscomb & Company, of Philadelphia. They have an office in Philadelphia and at that time they were one of the largest banking houses in the United States when they were connected with this proposition. That was when the permanent arrangements were made. Mr. Powellson was interested in 1912 the first time—pardon me, I don't say that I am correct about that; Mr. Powellson will state that. I was just giving my best information. I said that Mr. Powellson became interested in 1912 and we had all the money we wanted in 1913, from September on. We filed a bill for Receiver against the Carolina-Tennessee Power Company on October 18, 1913,

but at the time I did so I was not advised of its financial condition that I spoke of awhile ago or I would not have filed it. Subsequent to the filing of that I learned of what I said and the Carolina-Tennessee Power Company and I settled our differences, and they paid every cent of their obligations for indebtedness. In our bill for Receiver we contended that the Carolina-Tennessee Power Company owed us \$12,490.35, but they differed with me and we settled our differences amicably. At that time they owed the Bank of Murphy \$2,000.00 and paid it. They owed Witherspoon & Witherspoon \$75.00 and paid them. It was my understanding that it owed M. W. Bell \$280.00 and they paid it. It might have owed its taxes for 1912 and 1913, but it paid them. It was not insolvent in 134 October, 1913, and although I filed that petition for a Receiver I found out that it was not insolvent and it had all the money it wanted to carry out its business. I might have said in my suit that it was insolvent, but I was mistaken. In my suit I might have alleged that the Company was insolvent. In my suit I stated that they had suspended its original business for the want of funds to carry on that business. I had no knowledge then that I was mistaken in that allegation. I found out later that they had all the money they needed. As to the records in this case, I say that by an agreement between the attorney for the corporation and my attorney, the record was withdrawn from the clerk's office and burned here in the presence of the court. Messrs. Witherspoon & Witherspoon were my attorneys and the attorney for the Company was M. W. Bell. The court record of the case had been filed. I do not know that it was a part of the permanent record of the court, because the court allowed it to be withdrawn. It was a part of the court's records of the County and it was taken and burned up in the presence of the court. I think the Judge was Judge Frank Carter. We were standing there and he was sitting here and Mr. Bell and my counsel were there. The statement was made that the matter had been adjusted and we wanted to withdraw the papers and destroy the records and it was burned right there. Mr. William Axley was appointed receiver of the Carolina-Tennessee Power Company. He was receiver from January until April if we had a January term of court, if not until October. The Company was in the hands of a Receiver six months. It was not taken out of the hands of the Receiver until April, 1914. At that time we had an adjustment and the matter was withdrawn and the papers burned and that ended it. In June, 1911, the attorneys for the Company brought a condemnation suit against Mr. Browning and Mrs. Coit. 135 I cannot speak positively as to who instructed this to be done, but I think Mr. Ketcham did, and then I had charge of the other matters because Mr. George E. Smith was the Vice-President and he instructed the lawyers to do it and after a conference between the lawyers the suit was brought. The Coit land was located just beyond the end of our development. Mrs. Coit lived in San Francisco. Mr. George E. Smith wrote to her direct and then communicated with the Union Trust Company, her agent, and heard from her. She refused to sell. We did not make any offer to her; after

she refused to sell, that would have been fallacy. She said she did not want to sell her property. I do not know what the property was worth. Mr. Browning made Mr. Fain an offer of \$100,000 for the land. Mr. Browning was an adventurer; he did not have a dollar in the world, and Mr. Fain walked up on my steps on April 22d, 1911, and showed me a telegram saying that he had no authority to sell. Mr. Fain was rather indignant; he thought he had made a sale, but Mr. Browning did not have a dollar in the world. We investigated that. Finally he came to me and said if we would pay him what he was out he would sell out and get out of the way. I told him that I would not do it. I told him I would not give him a damn cent, that he was a faker and he was trying to hold us up, and I would not give him a damn cent. I had already filed the suit. As to why I filed the suit if he was a faker and I told him that I would not give him a damn cent, we wanted to cover all the interest there. The suit was filed in 1911, and it was removed to the Federal Court. The docket was so that we could not try it, I think. I reckon there has been one case pending there ten years. The attorneys for the other side have written me to continue it. We are ready to try it at any time. Lola Hartness owns some land along the river front here. Browning was after that land here, and I will tell you what he did about that. He went down there and got some kind of an order made that on the payment of \$300.00 by him the deed be made, and he left and not a penny of it was ever paid, and in 1912, the poor old woman came and stated her condition to me, and I filed an amended petition for her and asked that the order be stricken out, as her little children owned the land and she could not make a title, and we paid her some on it. We brought a condemnation suit against Lola Hartness, and it has not been tried. We brought one against James; I do not think they ever filed any answer. We are ready to try it. We bought one-twelfth interest in it and we are ready to try it. The suit has been pending six years. They never filed any answer. We did not buy it to run Browning away. We brought the suit to extend the interest in the property to the Carolina-Tennessee Power Company for the purpose of carrying out its project. Mr. Browning did not have anything to worry anybody with; he couldn't get \$100.00 cash on his own check at the bank. I did not bring a condemnation suit against Ramsey. Mr. Ramsey made a contract with the Company, and in my absence, Mr. Browning inveigled him into giving him a contract, and we started a suit for specific performance, but with an understanding that when we began to pay Mr. Ramsey, we would drop the suit for specific performance and we have got the receipts for these payments. I think we paid him \$250.00; I would not say positively. The last payment was made I think in 1912. In 1913, we did not have the money. I stated that since September, 1913, we have had all the money we wanted. As to why we have not taken up these options that we have had for six years, it was because in 1911 Mr. Browning came in here and interfered and we had to bring suit and get whatever interests he might have. Then in 1912 an old man by the name of McMullen came in here and he made such fabulous prices,

137 for instance, offered this property here (indicating the property), assessed at \$5,000.00, he offered \$20,500.00 for an option on it and abandoned that finally, and he offered other people such fabulous prices for an option to give him the privilege of selling that everything went in the air; that was in 1912 and 1913, and he abandoned nearly every one of them. He got the people excited beyond all reason. They were carried off with him, and in 1912 there was an effort made by parties to absolutely destroy not only this water power Company but nearly every other one in the State, that threw things into such confusion and every other water power in the State was on its p's and q's in 1913 through these works and every one was afraid and did not know what to do. This had a tendency to drive away capital. Since December, 1913, we tried to buy the Mashburn property, tried to make satisfactory arrangements with Mr. Reece, and tried to make satisfactory arrangements with Mr. Martin. We bought that land there from Simonds and since this suit began we bought this from Mr. Allen, paid for the Carroll contract, paid him 36 or 37 hundred, paid Mr. Green 1900, and paid \$15,000.00 for the Fowler tract. We did not have any contract for the Fowler tract. The money for the Fowler tract was telegraphed down here. That is the way these people do things. The bank in New York telegraphed the bank here, as I remember, the correspondent of the Murphy Bank is the Hanover National Bank. The money was deposited in the Hanover National Bank to the credit of the Carolina-Tennessee Power Company, and the Hanover National Bank telegraphed to the bank of Murphy to deposit to the credit of E. B. Norvell and S. N. Hickey the sum of \$15,000.00; that was done and then drawn out and paid to Mr. Fowler. The deed dated on July 16, and carried before Mr. Fain on the same date and filed for record on the 16th of July at 2 o'clock P. M.; and then on the 20th day of July, Mr. J. M. Martin, Justice of the Peace, took the acknowledgment of Mrs. Fowler, and then it was brought back and Mr. Fain probated it on the certificate of Mr. Martin.

138 As to when the condemnation suit of the Hiawassee River Power Company was started against the Foyler property, I only know from the record; it shows that on the morning of the 16th of July, 1914, the petition of the defendant to condemn the Fowler land was filed; that was before the charter had arrived. If the record in the last trial says that I swore as follows: "They, knowing that we were going to buy it, slipped in and condemned it without ever having offered to purchase it from him and then Mr. Nelson offered to purchase it from him after the organization, and simply knowing that we were going to buy the property, they jumped in about 1:30 o'clock on the 15th of July and started condemnation proceedings and we, knowing nothing about that, they just jumped in ahead of us," that is correct. I find that the condemnation suit is marked filed on the 15th day of July, at 1:35 P. M., A. A. Fain, Clerk Superior Court, 1914. So I must have been right. The second entry is filed July 16, 1914, 8:17 o'clock A. M., A. A. Fain, C. S. C. Summons issued on the 15th. You will notice that the summons nor the petition were served on Mr. Fowler until the 18th. The papers all show that. The summons for relief is dated July 15, 1914, and it is signed on that

date by Mr. Fain, the clerk, and served July 18, 1914. The trade
with Mr. Fowler for the land was at 8 o'clock in the morning. The
reason I remember the hour, I was sitting at the window, and I saw
Mr. Fowler drive up to my office and I went immediately to my
office and drew the deed. To draw the deed took possibly fifteen or
twenty minutes; I worked pretty rapidly, as soon as I could write
the description in there and put the formal parts of the deed and fill
it in, and I came to the bank with Mr. Fowler. I said that was be-
tween 8:30 and 8.45 in the morning. On July 16th, 1914, as
139 soon as Mr. Bayless took the acknowledgement, I paid Mr.
Fowler and carried the deed to Mr. Fain to probate and
order for registration, and he informed me that he had issued
proceedings for condemnation, and I asked him in whose name,
and he told me, and I looked for the charter of the Hiawassee
River Power Company, and could not find anything; and I looked
for the books and could not find anything, and I tele-
graphed to the Secretary of State to find out if the charter had
been issued. The first time that I heard of the condemnation
suit of the Hiawassee River Power Company against Mr. Fowler's
land was when I carried the deed to Mr. Fain to be attested and
he simply stated that he had issued some papers in condemnation
against the Fowler lands. He said some Company, I don't know
whether he said he did not know the name or not, but I found
out afterwards that it was the Hiawassee River Power Company.
I carried the deed to the Register of Deeds for registration about
2 o'clock on the 16th day of July, 1914. There was four con-
demnation suits in which Mr. Browning's name appeared, brought
by the Carolina-Tennessee Power Company. We never had any
appraisers or commissioners to assess the value of any of these
pieces of land that we condemned. No answers were ever filed
and until they were filed the matter could not be passed upon.
Ordinarily, when no answer is filed to a suit that is brought, that
suit is then in default. We did not wait to take advantage of
anything of that kind. We wished the defendants to have their
time to do what they chose. The two maps that I have testified
about were sent me, one in July, 1910, and the other in September,
1910. They were sent to be used for the benefit of the Company
as we might see fit and be directed. I kept these two maps in my
office from the time of their receipt in 1910 until June, 1911.
The suits against Mr. Browning and others were begun
140 after a consultation between Mr. Dillard, Mr. Bell, Mr.
Posey, Mr. Smith and myself, and whatever was agreed
upon then was carried out. I had no instructions from
Mr. Ketcham or any person interested in the Carolina-Tennessee
Power Company in New York relative to these suits before I filed
them, only in a general way. I reckon Mr. Smith, the Vice-
President, was looking after that. I do not know if I heard from
any party in New York; I will have to go over my correspondence.
It is my recollection that I did not hear. I will not go over my
correspondence and show you any instructions relative to the fil-
ing of these suits. Mr. George E. Smith was looking after that,

and whatever instructions were given to me either by Mr. Smith or Mr. Ketcham were discussed between Mr. Dillard, Mr. Bell, Mr. Smith and myself, and they are a part of the private instructions of the Company, and I will not divulge them unless the Court requires it. It would take me two or three years to tell what my general instructions were. I was general attorney for the State of North Carolina, and in addition to that a great deal of work in the immediate vicinity fell upon me and I used my own judgment to some extent, but I never did anything in regard to paying money, bringing condemnation suits without conferring with them. My recollection is that Mr. Smith, the Vice-President at Murphy, gave me the instructions to file these suits. Whatever was done was agreed upon between us all. The first suit was filed, I think, on the 20th day of June. That was one day before I claimed that the maps were deposited. If you understood me to say that I filed these maps in the Clerk's office under instructions received from Mr. Ketcham, I did not say that altogether; I said that the attorneys for the Company decided that they should be filed there, and that, together with instructions from Mr. Ketcham. That was my answer. I think a letter was written in New York on either the 17th or 19th of June.

141 1911, with instructions to file the maps. I will have to see that letter. I think I have that letter. I know that on the first day of July a letter was directed to Mr. Ketcham saying that we filed the maps. As to your understanding that I said that I filed these maps under instructions that I received from Mr. Ketcham, because we were going to file these condemnation suits, that is in connection with the conclusion reached by the attorneys as to what should be done under the charter. I don't know whether Mr. Smith who was here and had charge of it wrote to Mr. Ketcham or not. I do not say that Mr. Ketcham did not know that it was contemplated; I am satisfied that Mr. Ketcham had been advised that we contemplated filing the condemnation suits. I drew the petition for condemnation. Originally I drafted a form as provided for in the charter and I took that to Mr. Dillard and Mr. Dillard re-drafted it. I want to state that there is an interlineation in my handwriting between the second and third or the first and second lines, and before filing that petition I took it to Mr. Dillard for his approval. The complaint in the present suit between the Carolina-Tennessee Power Company and the Hiawassee River Power Company was drafted in New York; I did not draw it. I drew a rough sketch and sent it to New York and they re-drafted it and signed it in New York. I do claim that the maps were filed with the Clerk. I do not know what your understanding of the word "filed" is, but in this State they are required to be deposited with the Clerk. I do consider them filed. In drawing the petition in this case we used the language: "In or about June, 1911, the plaintiff deposited in the office of the Clerk of the Superior Court of Cherokee County a survey of said works showing the location thereof and the lines necessary therefor." We used the exact language of the charter. It said

deposit. That is what the Legislature said we should do.

142 In Section 8 of the charter the word "filed" only appeared twice. In the former trial I was asked this question: "The charter provided that they should be filed," and I made this answer: "I did not say they should be filed. The charter provided that they were to be deposited there." That is a correct answer, for it does not say that they should be filed. In the former trial I was asked this question: "You did not tell him that the charter required them to be marked filed," and I made this answer: "I do not remember that I did, sir. It required them to be deposited." On the former trial I was asked the question: "What did you do with them?" and I made this answer: "Put them in the vault." In the former trial I testified: "No, sir, I gave them to the Clerk, I do not know how long they lay there, possibly they remained there a day or two or three, for the letter was written on the 28th saying that it was deposited and they stayed there sometime between the day we deposited them and the 28th of June when we had borrowed them back from the Clerk." As to how long these maps stayed in the Clerk's office after we deposited them there, I am speaking from memory, and based upon the letter as it appears here on the 28th of June when I say they were deposited, until some one connected with the Company borrowed them back from the Clerk. I think Mr. Smith borrowed them back from the Clerk about the 28th. I am relying upon the letter. They stayed there some time between the time we deposited them and the 28th of June. The possibility is that they were taken out on the 28th of June. When the maps were taken out they were carried back to my office; I cannot say how long they remained in my office. We returned them to the Clerk's office, as I remember, and then borrowed them back again. They did not remain in my office from the time we took them out in June, 1911, until July, 1914. They were returned after Mr. Smith took them out on the 28th and then they were borrowed

143 again, and then it was from that date that we kept them in my office until sometime in June, 1914. I took them back the last time in July, 1914. I do not remember when Mr. Smith took them back the first time. In the last trial I was asked this question: "So they (the maps) have actually been in the Clerk's office only since last July and the few days that you had them there when you deposited them to start the condemnation proceedings," and I made this answer: "Yes, I think that is correct, sir." I don't undertake to say how many days, either then or now. I know I had them in my office there when I got Mr. Nelson to go down the river to try to deal with Mr. Hamby. These maps have never been marked filed by the Clerk in ink or pencil. We brought one suit against the Carolina-Tennessee Power Company, and since the beginning of this action we brought one on a matter of difference of accounts between the Company and myself, and they adjusted that very fully and a judgment of compromise is filed here. They paid every dollar of it and every dollar of the costs. There was no intention or insinuation that

the Company was insolvent. It was only a matter of difference between the Company and myself. In the latter suit we attached their property because we wanted to. Mr. Weaver let me have a copy of the minutes of the Hiawassee River Power Company when we were having a hearing in the case of the Hiawassee River Power Company against Martin. I kept the minutes because I borrowed them for that purpose. Mr. Weaver stood there and looked at me and he said that I ought not to copy them. Mr. Weaver was present when I was copying the minutes and he asked me if I was copying them and I told him I was and I turned them over to Mr. Bell and Mr. Bell finished copying them right there.

Mr. Weaver was the attorney for the Hiawassee River Power
144 Company and he is not here now. He produced the minutes in response to our notice to produce and they were brought into court to be used.

Redirect examination:

I have not seen the minute book. From the date of the organization of the Carolina-Tennessee Power Company on May 25, 1909, an office of that Company was maintained here in conjunction with my office until the fall of 1913. I had two rooms in the old Bank Building connected by a door and the Carolina-Tennessee Power Company occupied one room and I the other. Since then their office has been with mine, since February, 1914. The sign was kept up over there for several years. Mr. Ketcham had a sign about three feet long and about twenty or twenty-two inches wide painted in large letters, I will say three inches high, with office of the Carolina-Tennessee Power Company painted on it and that was driven up on the front wall next to the street door that went into the room occupied by the Carolina-Tennessee Power Company's office and that remained there for several years, when I moved from there, I did not take the sign with me. It remained there for some time afterwards. I think it was pulled down after I left, I do not know what became of it, but I have been active in the affairs of the Company almost continuously except for a short while from the middle of October, 1913, until February, 1914, and from then until awhile in July, 1915, and then after that. I met Mr. J. P. McMullen casually in the fall of 1912, I think sometime in December, 1912. Mr. McMullen came here as the agent of Vandeventer, President of the defendant Company. He is the man that took options up and down or rather down on the Hiawassee River at fabulous prices in the winter of 1912. He took 47 options. I have read every one of them. These options expire-
145 taken. One of them is dated as late as April 1, 1913, another May 1, 1913. There was six out of 47 on which the limit was May 1, 1913, and the others expired prior to that time, in February and March, 1913. I have examined the records to see if Mr. McMullen or Mr. Vandeventer took up the options at that time and took contracts of sale on the lands. They aban-

done every one of them. I remember that in the former trial Mr. Vandeventer swore that Mr. McMullen was his agent. I do not recall that he testified in the former trial that he did not take up a single one of the McMullen options. Mr. Nelson notified Mr. McMullen at the time he was taking these options that the Carolina-Tennessee Power Company was claiming the right to develop this water power on the Hiawassee River. Mr. Nelson was working for Mr. McMullen and Mr. Vandeventer. Mr. Nelson is Secretary and Treasurer of the Hiawassee River Power Company. He swore to the answer in this case. In October, 1914, I saw the minutes of the Hiawassee River Power Company. The answer in 1914 in which the minutes were produced was sworn to by Mr. Nelson as Secretary and Treasurer. In the present case Mr. Nelson swore to the affidavits as Secretary and Treasurer. When I stated that Mr. McMullen was taking options at fabulous prices, I meant, for instance, that this piece of property here that was assessed at only a very few thousand dollars, not to exceed four thousand, if over three thousand, Mr. McMullen took three options; it was options for \$20,500.00. I do not know the number of acres in that tract. He offered the Lola Hartness heirs \$800.00. I said that those were fabulous prices because they were far beyond any assessment made in the view of any one who was familiar with those things. For instance, here is an option for \$2,500.00 for 100 acres of land lying right in here next to the mountain, but I do not supposed it is assessed at \$200.00. The option price was \$2,500.00. That was the land of Q. W. Stiles. I know Mr. Hugh F. Vandeventer. It is possible that I met him in the summer of 1913 just after Mr. Powellson was here in June, 1913. I do not recollect the date that I first met Mr. Powellson. I think he was here about the 21st of June, 1913, and Mr. Vandeventer came on about the 28th just after Mr. Powellson was here having some work done down on the river. The first contract that Mr. Vandeventer had was dated the 28th day of June, 1913; that was a few days after Mr. Powellson came here and went down the river to investigate this water power. On the 26th day of February, 1914, upon invitation by myself to Mr. Vandeventer, he came to my office in Murphy and spent a considerable length of time there, possibly two hours, discussing the affairs of the Carolina-Tennessee Power Company, its rights upon and down the Hiawassee River, but particularly what I invited him there for was to discuss the interests that he claimed on the river and to undertake to purchase whatever interests he might have in any land or in any contracts down the Hiawassee River. I then spoke to him about purchasing from him and he informed me that his interests were not for sale. I told him then if he would not sell that the Carolina-Tennessee Power Company would have to take steps to condemn his interests. I explained to him the time we came in that the properties we had, the extension of the property of the Carolina-Tennessee Power Company from the Tennessee line to the mouth of Hangingdog Creek, and told him, on a suggestion of his, that we would not get out of his way and he explained to me that he wanted to establish

a private industry here, and he requested me not to bring condemnation proceedings until he could see Mr. Ketcham in New York and Mr. Rice. I don't remember that I used the word "surveyed," in reference to the Carolina-Tennessee Power Company having surveyed out the location for its works. We discussed generally the rights to the properties and the object of the Carolina-Tennessee Power Company. I explained to him as fully as I could, in an ordinary conversation, the rights of the Carolina-Tennessee Power Company from the mouth of Hangingdog Creek to the Tennessee line, and its objects; that we were to put up a water power development for public use and he wanted to put up a private enterprise. As to telling him anything about the plaintiff's rights or what the Company claimed, I do not remember telling him anything further than that we claimed the lands and the pre-emption and what we had already bought. I told him we claimed the pre-emption and told him that we had bought and paid for about fifty per cent of the land by solid deed and told him that his coming interfered with us, and discussed particularly the names of the people we were claiming from. We discussed the two dam sites, the one at Appalachia and the one at Beaverdam Creek. I told him about that. I do not recollect that I told him the height of the proposed dam at Appalachia. I told him how far the water would be turned and that it would be backed near the mouth of Beaverdam Creek. As to the dam at Beaverdam Creek, I told him that the water would be backed from there somewhere in the neighborhood of Hangingdog Creek, there about the mouth of the Nottley River. It never has been the policy of the Power Company to press condemnation suits. The condemnation suits brought are not held up under an agreement that I know anything about between counsel. At the time I paid Mr. Fowler for his land I had absolutely no knowledge or information of the proposed condemnation of his land.

The plaintiff here offers in evidence in the suit of the Hiawassee River Power Company against Alvin Farrow and others the affidavit as follows:

"NORTH CAROLINA,
Cherokee County:

148 "H. F. Vandeventer, being duly sworn, says that he is an officer and director of the Hiawassee River Power Company, to-wit, its President; that he had read the foregoing petition; that the same is true to his own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters he believed it to be true.

(Signed)

H. F. VANDEVENTER."

Below is "subscribed and sworn to before me this July 15, 1915."

Under it. "A. A. Fain," then below again: "Subscribed and sworn to before me this July 16, 1914, A. A. Fain, C. S. C."

On the back is this entry: "Filed July 16, 1914, at 8:17 A. M. o'clock, A. A. Fain, C. S. C.," and this return of the Sheriff: "Served the 18th day of July, 1914, by delivering a copy of the within petition to the defendant, Dick Fowler or Alvin Fowler." Signed "C. B. Hill, sheriff, Cherokee County, by C. S. Burger, Deputy Sheriff."

I have already testified that the plats showing the plaintiff's location were borrowed from the Clerk's office. It is customary in this County for counsel or for the attorneys to borrow from the Clerk's office the original files of the papers when they see fit to do so. It is customary for the clerk to permit counsel to take papers from the files. It is done all the time. We go to the Clerk's office and ask for a file of papers. I don't reckon there is a lawyer's office in town that you couldn't find a file of papers in. This has been the custom ever since I have been here. I have never seen any book or record in which the Clerk enters or keeps a record of the maps filed in his office. I don't think he has such a book or record.

By the Court: There is one thing that I want to understand a little more distinctly. The witness stated that the suit of Norvell versus plaintiff Company for a receiver was withdrawn and the papers burned; how was that?

A. It was done by consent and direction of the Court. The matter was stated here publicly to the Court and he consented and directed it burned. There was no order made further than that. Mr. Bell and Mr. Witherspoon were present. There was nothing whatever secret about it, no private conversations, it was done openly.

By the Court: Was the court in session at that time?

A. Yes, the court was in session. There was nothing done to conceal anything in the world about it that was done in the premises; it was fully explained to the Judge.

Cross-examination:

Mr. Fain (Clerk) is a competent official, but like all other men, makes mistakes. I can point to you now where there were two appeals from the Justice of the Peace that he took himself last fall, that he claimed to be interested in, that he failed to docket. Last January I had to file affidavits and have these appeals docketed, and then the records of these are orders which were signed by Judge Adams on the minute book that were directed to be recorded and they were not. Mr. Fain makes mistakes. I find that we are all derelict sometimes. I told Mr. Vandeventer in February, 1914, that our Company owned 50% of the river front. At that time we owned more than thirty-three and a third per cent; I think I am safe in saying forty-five per cent. At the time I invited Mr. Vandeventer to come to my office in February, 1914, the Company was in the hands of Mr. Axley as Receiver. There was an order drawn and signed by consent, discharging the Receiver. Mr. Axley was Receiver until April, 1914. The order for his discharge had been drawn in February and signed up. The Company went out of my hands as Receiver

in January, 1914. I was not talking to Mr. Vandeventer relative to his purchasing the lands of the Carolina-Tennessee Power Company. Mr. Vandeventer suggested it, but that was not what he came to my office for. I invited him to come to discuss the interests that he had.

W. V. N. POWELLSON, sworn for plaintiff, testified as follows:

My name is W. V. N. Powellson; I live in New York City. I am a Consulting Engineer. I was educated at the United States Naval Academy at Annapolis, and after I graduated there I was sent by the United States Government to take a second course in engineering at the University of Glasgow, Scotland. I served 13 years on the active list of the Navy, and there I had considerable engineering work to do a good deal of the time aboard ships. I now have a commission as Lieutenant in the Navy on the retired list. I was retired in July, 1902, because of wounds received in the line of duty during the Spanish-American War. I am President and Director of the Carolina-Tennessee Power Company. I own some of the stocks and bonds of the Company. As to when I first became interested in the Company, Mr. Ketcham came to see me in the fall or winter of 1912 and told me about the Carolina-Tennessee Power Company. He said he wanted to raise some additional capital to carry forward the enterprise and asked me whether I and my associates would take an interest in the proposition. I told him to bring to my office all the papers, maps, and records that he had. He did so subsequently. He brought to my office maps of the upper and lower reservoirs showing the thread of the stream, the banks of the river, and certain contour lines and certain dam sites. These maps showed two reservoirs, each about 13 miles long, they showed the contour lines contemplated, and elevation of the water at two places about 150 feet above the natural level, one near the State line and the other at the creek called Beaverdam. On these maps was listed the property, the names of the owners and the acreage that would be necessary for the enterprise. With these maps he brought a report made by Mr. Church, a man whom I know to be a hydraulic engineer and a report from Prof. Burr, whom I know to be Dean of the Engineering School of the Columbia University of New York. These are the papers that I now recall. They were brought to me but I would not say there were no others. Mr. Ketcham called on me almost every time that I was in New York. In explanation to saying that he saw me every time I came to New York, I will say that at that time I was building a dam on the Nolachucky near Greenville, Tenn., and was out of New York for a very large majority of the time. I made Mr. Ketcham a promise that I would come over to Murphy, North Carolina, to look at the Hiawassee River about the 1st of April, 1913, but I was unable to keep that promise because of some large floods and the losing of my coffer dams on the Nolachucky, and when I got things in shape there, about the 20th of June, I was able to come over here, and I wired Mr. Smith, Mr. George E. Smith, that I would be here and to have some horses

ready that I wanted to ride down the river. I arrived in Murphy on or about the 24th of June, 1913, and immediately Mr. Smith and I started down the river on horse-back. We spent the first night at the Whitcomb home near Beaverdam Creek and we spent some time in examining the dam site near that point, and then on the following day we rode along the bank of the river down to Appalachia. We stayed the next night at the house of Mr. Baines, the following day we went over to the Tennessee copper, the day after that I returned to the work at Greenville, Tenn. After I arrived at Greenville I again went over the maps, reports and papers which Mr.

Ketcham had given to me. As a result of that examination, 152 I sent a surveying party to Murphy with instructions to take the maps and reports and in a general way find out whether they were substantially correct. The party came over and stayed about a week or ten days, and came back and reported to me that they had found so far as they had gone that the maps and reports were substantially correct. A little later, upon completion of the work in Tennessee, at the end of October, 1913, I sent another surveying party to Murphy with instructions to go more fully into the details of the work shown on the maps and reports brought to me by Mr. Ketcham so that we might be sure whether that work was accurate or not, and if not accurate, to what extent it was inaccurate. I accompanied that party; went down the river and made the Whitcomb home my headquarters while I was there, from which point I went up and down the river a considerable distance. I stayed about ten days and then I left. I left upon the grounds there my principal assistant who was associated with me in the building of the dam at Greenville and some of the other engineers who had instructions to do further surveying and checking along the river. That party stayed here, as I recollect, about five or six weeks. My principal assistant then returned to New York and my draftsman worked up the data which he had taken. As a result of the examination, I recommended to some of my financial friends with whom I had previously 153 approached the subject, that I thought the proposition had merit and it was one in which they might take an interest. On my recommendation they did take an interest in the proposition, and they now control it.

As to my financial friends and I acquiring controlling interest in the property, we employed Mr. M. A. Rice as our agent to undertake to discover the location of every share of stock and get every bond that the Company had issued. We had him to travel from Boston through New England, then he went to Chicago, New York and other places possibly and he was able to locate all of the 153 stock and all of the bonds and to get options upon them, and after he had taken an option upon 100% of the bonds and 100% of the stock, we made a trade with every owner and secured possession of every share of stock and every bond that had been issued by the Carolina-Tennessee Power Company, and then we advanced cash into treasury of the Company as it was needed. My financial associates were the Banking Company of Bretand, Griscomb & Company. Their headquarters or principal office is in the City of New

York. They have a large office in Philadelphia and another in Paris, France. Their financial standing is very high. Their principal business is the development and the financial management of public utilities; and corporations distributing electrical power. All of the stocks and bonds were taken up about the middle of January, 1914. A large amount of work had been done in acquiring stocks and bonds before that, in getting the options. I was elected a Director of the Company in April, 1914. The first thing we did after we became the owners of the stocks and bonds of the Company, was to send Mr. George E. Smith down to North Carolina to find out how much money the Carolina-Tennessee Power Company owed so that we might pay the debts of the Company. He came to Murphy and then came back to report to us in New York. Subsequently we sent Mr. Ketcham and Mr. Rice in February to Murphy and we paid all the debts of the Company, took it out of the hands of the Receiver. I instructed Mr. Ketcham and Mr. Rice to take up with Mr. Norvell at that time the acquisition of the land from the party whose name was understood to be Mr. Vandeventer, whom I understood to have been engaged recently at that time in the acquisition of land lying along the Hiawassee River between lands that were already owned by the Carolina-Tennessee Power Company. I had a list of the lands before me when I sent Mr. Ketcham and Mr. Rice down there.

154 The lands acquired by Mr. Vandeventer have interfered with the lands of the Carolina-Tennessee Power Company. The Carolina-Tennessee Power Company could not develop the water power at the dam sites without covering the lands that were purchased by Mr. Vandeventer. I gave instructions to have Mr. Vandeventer's claims condemned. I told Mr. Ketcham and Mr. Rice to ask Mr. Norvell to see Mr. Vandeventer and try to buy his land at a fair price, and if he could not, to have Mr. Norvell bring condemnation suits. I left from the country the day that Mr. Ketcham and Mr. Rice returned to New York, and I did not come back until between the first and fifteenth of May. Immediately upon my return, I sent for Mr. M. F. Hickey of Johnson City, Tenn., who had worked for me in the acquisition of land in connection with the Eastern Tennessee Electric Co., whose dam I built near Greenville. Mr. Hickey came to New York to see me the latter part of May, or the first of June, 1914. At that time I exhibited to Mr. Hickey the map of the Carolina-Tennessee Power Company, showing the contour lines and the lands that were needed to make these developments. I pointed out upon these maps the Fowler tract. This tract I told Mr. Hickey that I had met Mr. Fowler, and that Mr. Fowler had the reputation of being a hard man to deal with, slow to trade and I wanted him to go down on the river and meet Mr. Fowler and to buy the Fowler tract. I told him I wanted him to buy other lands but I wanted him to clean up one thing at a time and stick to the Fowler purchase until he got it and when he got it, I would tell him what other lands to work on. I gave him a price that I thought was a fair price, authorized him to offer that price, subsequently I agreed to a somewhat higher price, and I deposited upon the 10th of July, in the Hanover National Bank of New York, \$15,000.00 to the credit

of the Bank of Murphy, subject to the check of the joint signatures of E. B. Norvell and M. F. Hickey, and I instructed Mr. Norvell and Mr. Hickey to pay over to Mr. Fowler \$15,00.00 and take a deed to his land. That money was subsequently paid to Mr. Fowler and the Company secured a deed to his land in July, 1914. I visited the home of Mr. Jessee Carroll with Mr. Norvell and I secured from Mr. Carroll a deed to his land lying on the south side of the Hiawassee River at this point. About the same time, long about the 25th to the 27th of July I also secured a deed from Mr. John Green for this portion of his land (pointing it out on the map), that being the land that was under the contour line at the elevation of the crest of the dam located to be built at Beaverdam Creek. This deed we secured and put to record.

The plaintiff here introduces the minutes of the meeting of the stock-holders of the Carolina-Tennessee Power Company, April 23, 1914, as Plaintiff's Exhibit No. 93, a copy of which is hereto attached. Plaintiff introduces the minutes of the meeting of the Board of Directors of the Carolina-Tennessee Power Company, dated June 16, 1914, as Plaintiff's Exhibit No. 94, a copy of which is hereto attached.

The witness Powellson then continued to testify:

I was present at a meeting of the Board of Directors held in New York on June 16, 1914. Under a resolution of that meeting I was authorized to purchase such lands as was necessary for the purposes of the Company. The lands included in the resolution were the lands lying below the contour lines shown on the two maps which we had at that meeting, the lands that were not already owned by the Carolina-Tennessee Power Company, on the Hiawassee River. They were the lands, these lands that were shown in white here, with the exception of the Fowler place and the Carroll piece and the Green piece which we acquired by their deed; the other red lands the Company owned in fee as of that date, and they extended from the State line between North Carolina and Tennessee to about the junction of the Hiawassee and Nottley Rivers at what is known as Hangingdog Creek. That was the first meeting of the new Board and I explained to the Board which land it was the Company was negotiating for, what land it was that we were trying to get and I asked one of the Directors would not introduce a resolution which would give me the authority to go ahead and acquire the land that we needed to carry out the development upon which the Company had been at work. This resolution was introduced by one of the Directors. I also asked the Board to appoint an Executive Committee and to give that Committee the authority of the Board to act when the Board was not in session, that I wanted a Committee that I could get quick action and not have to call all of the Directors together. I asked that that Committee be empowered to get money into the treasury of the Company; and one of the Directors introduced such a resolution, and Mr. Shufro and I were appointed as an Executive Committee, Mr. Shufro being a man I saw almost every day and with

whom it was easy for me to get, and, pursuant to that authority I had money put into the treasury of the Company as fast as it was needed. I have a memorandum that I had made, showing how much river frontage on the Hiawassee was owned by the Tennessee-Carolina Power Company at the time this suit was brought on August 21, 1914. The Company owned in fee on August 21, 1914, twenty-four and a quarter miles of river frontage. Counting both banks of the stream, the river front, approximately, in the entire proposed development is fifty-three to fifty-four miles. Practically fifty per cent of the river front was in the basin. There was about thirteen and a third miles in each basin. The basin is almost twenty-six and a half miles long, measured along the front of the stream at the

157 State line of North Carolina up to within a short distance of the mouth of the Nottley River near Hangingdog Creek. Mr. Fowler was paid for his tract of land on July 16, 1914. Mr. Fowler's land has about five and a quarter miles of river front. The Carroll tract was acquired on July 25, 1914, and has about one and a quarter miles of river front. The John Green tract has about two and a quarter miles of river front. In the contracts of the Carolina Tennessee Power Company that have been offered in evidence there are substantially twelve miles of river front. The deeds of the Company covered between forty-nine and fifty per cent of the total river frontage involved in the development between the State line and Hangingdog Creek, and the contracts covered substantially twenty-five per cent, making seventy-five per cent of the river frontage held either in fee or under contract at the time of bringing this suit on August 21, 1914. This includes both sides of the river. The purpose of buying the Fowler land was to avoid the condemnation suit against Mr. Fowler. He would not sell the strip along the river, but wanted to sell the piece as a whole, and in view of the price and size of the piece of land and the probable *slavage*, the Company thought it would be advantageous to make the trade with Mr. Fowler upon the basis which he proposed. The last time that I was here was between the 20th and 24th of July, 1914, the time that I took the deeds from Mr. Carroll and Mr. Green. I was here then about ten days. As to how much my associates and I have invested in the Carolina Tennessee Power Company property, exclusive of the stocks and bonds, up to the time this suit was brought, we paid \$15,000.00 to Mr. Fowler in cash, and \$3,000.00 to Mr. Carroll in cash, \$1,000.00 to Mr. Green in cash, and we paid other moneys for lands, but I think it was after the bringing of this suit. This totaled up

158 \$19,000.00, and then we paid off certain claims and indebtedness against the Company and I should say that at the beginning of this suit we put into the treasury of the Company and expended for its purposes in the neighborhood of \$35,000.00. That does not count other sums that we paid for the securities of the Company, it includes only the moneys that went into the treasury of the Company and were expended for the Company's benefit. It does not include any salaries. The President served without a salary. It does not include any money that may have been expended for the benefit of the Company prior to my being connected with it. I have

I have been an engineer and a builder of electrical power developments or plants since 1908. When I first went into the hydro-electric business, it was in association with Mr. Hugh F. Cooper, under the firm name of Cooper & Powellson, and I had a good deal to do with the Hebkin dam near Yellowstone National Park on the Madison River and we were also the consulting engineers and had to do with the plant of the Missouri River near Great Falls, Montana. We also had to do with the construction of the development on the Columbia River in Washington and with the construction of the Keokuk dam near Keokuk, Iowa, on the Mississippi River, and then, as an individual, after the dissolution of the firm of Cooper & Powellson, built the dam and distributing system for the Tennessee Eastern Electric Company on the Nolachucky River near Greenville, Tenn. I and my associates are financially able to develop these propositions on the Hiawassee River. The purchases from Mr. Fowler and Mr. Green were as straight as anybody could make them. I have never gotten my money back, and have no strings on it. I paid for it and have a deed for it. In my opinion, the proposed development of the building of a dam at Appalachia is feasible and practicable. The same is true of the proposed dam at Beaverdam.

59 The plaintiff here offers in evidence the minutes of the meeting of the Board of Directors of the Carolina-Tennessee Power Company, of July 27, 1914, as Plaintiff's Exhibit No. 95, a copy of which is hereto attached.

The plaintiff also offers in evidence the minutes of the meeting of the Board of Directors of the Carolina-Tennessee Power Company, of August 15th or 17th, as Plaintiff's Exhibit No. 96, copy hereto attached.

Plaintiff introduces letter of July 27, 1915, from the Carolina-Tennessee Power Company, to the defendant, the Hiawassee River Power Company as Plaintiff's Exhibit No. 97, which is included in Exhibit 96.

The witness Powellson continues to testify:

In the fall of 1912 when I had a conversation with Mr. Ketcham in regard to the affairs of the Tennessee-Carolina Power Company, he told me of his previous arrangement with William L. Cox, to provide the money for the development of the Hiawassee River proposition, and that Mr. Cox had laid down on him and had not furnished him all of the money he had agreed to. That was the time that he asked me to interest my associates to take the place of Mr. Cox and furnish the money. I took charge of the Company in good faith for the purpose of executing the objects of the corporation.

The following questions were asked:

Q. Please state whether or not you took charge of it in good faith for the purpose of developing this water power?

The defendant objected to this question on the ground that the attention of this witness, who is a stockholder in the corporation, is not material. The true question is as to what the purpose of the

corporation was and this is to be gathered from what was done; the acts of the corporation and the intention and purpose of an individual stockholder is not pertinent, relevant or competent.

The objection was overruled and the defendant excepted, the same being Defendant's Exception No. 3.

To this question Powellson answered:

I went into this proposition and put money into it in good faith for the purpose of bringing about the development of the Hiawassee River for the power purposes between the State line and the mouth of Hangingdog Creek for the development of electrical power purposes. Since I have been the President of the Company I have been the chief executive of the Company, acting as its President and General Manager and have been active in the management of the Company's affairs since I became associated with it. I have acquired lands for the Company, I have studied engineering questions involved, studied the means and methods of proceeding with the construction; went on the grounds in July, 1914, since that date we have not spent a great deal of money in the acquisition of lands.

It is necessary for the water power development of the Hiawassee River to acquire the lands that would be covered by the ponds that are created by the dams and the lands upon which to rest the physical structure of the dams and power houses. These are all the lands necessary and they are marked in a general way by the contour lines of the ponds. Inside the contour lines of the two proposed dams of the Carolina-Tennessee Power Company, there are seventeen hundred and fifty acres required for the 150 foot dam at Appalachia. This includes the ground upon which to rest the dams and power houses and the ground that would be covered by the water. The lands necessary for the upper development are twenty-seven hundred and fifty acres and that includes the land upon which to rest the dam 150 feet high and power houses at the Beaverdam Creek location, together with the lands that would be covered by water by the construction of a dam 150 feet high. This acreage does not include the river bottom; they are the acreages of land required. The Carolina-Tennessee Power Company had acquired in the lower basin at the date of the commencement of this action, in fee, about ten hundred and fifty acres or sixty-one per cent of all the lands required in the lower basin for a dam 150 feet high at the State line at Appalachia.

In the upper reservoir, at the time this suit was brought, the Company had acquired and owned in fee simple about 950 acres out of a total of 2750 acres, being approximately thirty-five per cent of the total. The total amount owned in both basins was approximately 2000 acres and represented a little over forty-five per cent of the total acreage required for the two developments.

Cross-examination:

Of the frontage owned by the Company at the time the suit was brought, amounting to twenty-six and a quarter miles, five and a

quarter miles was the Fowler land and two and a quarter miles the Green land. This frontage of seven and a half miles, deducted from the total leaves eighteen and a quarter miles. The Carroll land had a frontage of one mile; this, deducted, leaves seventeen and three-quarter miles. When I went into the Company they owned then seventeen and three-quarter miles; this was owned in fee, and was about one third of the river frontage necessary. When I say that the Company has contracts for twelve miles of frontage, I mean that is not included in the land for which we have deeds or contracts. I am talking about the contracts taken by E. F. Smith and the Company back in 1909 and in 1910. These contracts are now seven or eight years old. The only payments that I know of being made on the old contracts was a payment of \$3,000.00 to Mr. Green, and I would have been able to make others when you gentlemen interfered. I have included the Green frontage in the total frontage of twenty-six and a quarter miles; the twelve miles is not included. Neither I nor the Company have paid anything on the twelve miles of frontage for which we claim contracts. In these old contracts I think there is a clause substantially to the effect that they are null and void if the payments are not made at a certain time. Mr. Ketcham first approached me about the proposition in the fall of 1912. I have described some of my movements through 1913. Mr. Rice who got the information of the bonds and stocks, was Mr. Ketcham's attorney and my friend. The first money put up on the proposition was in June, 1913. When I used some traveling expenses was in August, 1913, for the expenses of surveying parties. The next was in December, 1913, for a larger surveying party. The final payments on the stocks and bonds were made around the 10th day of January, 1914. I think Mr. Ketcham had some stock. I think he had five shares of stock. I bought all of the stock and bonds of the Company for myself and associates. In the purchase of securities from outside parties, no money went into the treasury of the Company. I estimated that the Company has about 2,000 acres of land, but about 774 acres of Fowler land were not estimated. Whatever I might have estimated the total acreage to be at the time I went into the proposition, the Power Company had not given up \$300,000.00 worth of bonds for it. The land is what the Power Company got under the contract between the Power Company and the Carolina Construction Corporation. There is a clause in the contract between the power Company and the Construction Corporation that the Construction Corporation will buy all lands necessary for these two dams, and convey it to the Power Company in consideration of its stock of \$250,000.00 and \$300,000.00 of its bonds. My idea of the contract was that the Construction Corporation was to acquire all the lands needed to build all dams and works necessary to generate the electric power and to receive a block of bonds and a block of stocks and the payments to be made on account at specified times, but I did not understand that the \$300,000.00 of bonds or \$250,000.00 of stocks was for any specific thing; it was for a general payment under the general contract for which several things were to be performed. I have been

down on the river and seen the two dam sites. I can tell you something about the foundation of a dam site by looking at it and feeling of it. I felt the foundation of the river. I was in a boat. I felt of the bottom; I felt rock. As to telling anything about the strata or fissures, whether or not it was a boulder, I can tell if it was a boulder when I see the ledge running across it. I can tell whether that ledge was one or two or three feet thick. I built a dam in Tennessee on that kind of judgment and I would build one here on that kind of judgment. It would cost a lot of money. I prepared to build and construct a dam without knowing any more than I know now about the foundation. I would not have drilled them. There is no more important part about a dam than to know about its foundation. From my information by feeling the rock or what I could see on the banks, I was prepared to build a dam. I did not say that we would not, when we went to build it, see whether there was another place within a thousand feet of there that was available, but so far as the structure of the rock down in this particular place is concerned, there is hardly a place across that river where it is not practical from an engineering standpoint to build a dam. When I went into the proposition I understood there was to be a dam at Appalachia. The

164 Company owned the Hickey piece on the south side of the river at Appalachia, about ten acres. From two to three hundred feet of frontage would be a plenty to stand a dam on with great ease for that particular purpose. I was going to stand on the other side on the property of the Southern Extract Company. We have not bought it but we have been told that we could have it when we were ready for it. Mr. Obern, I believe, told the Vice President to go ahead, that he wanted to see the dam put up and he would co-operate with us. The party has not been ready to proceed with the building of the dam, but if it had not been interfered with here, it would have been. No, sir, we did not own the property adjoining the Hickey land on the south side of the river. My understanding is that it belongs to a man by the name of Whitaker Butler. He did not tell me that he was ready to turn it over and I have not tried to buy it, nor started any condemnation suit for it. Until July 1914, I did not own the Fowler land, but I own it now. We own this land known as the Mollie Whitcomb land and the Company has negotiated for this land at the time when I first met Mr. Smith. I adjoined the Beaverdam site. From the organization of the Company in 1909 until I went into it and until July, 1914, I did not own both sides of the river at the Beaverdam site. I was present at the Directors' meeting on August, the 15th or 17th, 1914. At that meeting we passed a resolution approving what the Company had located a long time before relative to the dam sites and we were ready and these were the plans that we were going to carry out. When I went into this Company Mr. Norvell or Mr. Axley was the Receiver from October, 1913, until April, 1914. The final transaction occurred sometime in July, 1914. The money that we have spent in acquiring the Fowler lands and the Green lands and the Carroll land has been money that my associates and I have advanced and loaned to the Carolina-Tennessee Power Company.

165 Redirect examination:

Relative to the contracts taken by E. F. Smith and the Carolina-Tennessee Power Company in 1910 and in 1911, that we have introduced, I say that in July, 1914, I tried to make some payments on account of these contracts, but there was something wrong with the titles, Mr. Norvell did not approve of it, and then this lawsuit having come on and these interferences of the Hiawassee River Power Company and the affairs of the Carolina-Tennessee Power Company were such as to make us wait for further investigation. We wanted to go ahead and acquire the land, but we wanted to know, and we wanted time to find out whether the titles are good and make the payments, and this controversy has been going on since July, 1914. It started in July, 1914, by Mr. Rice giving notice to the Hiawassee River Power Company not to interfere, and when they proceeded to interfere we brought this action. The title to the Robertson tract of land has never been disputed. In the Fowler land there is 255 acres within the contour lines in the upper basin and 33 acres in the lower basin. At the upper dam site there is no strata. The stone is a kind of granite, hard and very solid. It runs all the way across; there is no question about the bottom there and no question about the hills. I am familiar with the topographical formation of the stone in this section. I built a dam over in Tennessee. It was a dolerite rock over there, a lime-stone bar, not so good as this; this is a harder rock, harder to crush. I made an investigation and study of the previous engineer's reports and investigations of these dam sites. I had all of this information, from Mr. Church and Mr. Burr. Mr. Church and Mr. Burr were both wonderfully interested in the report and the foundation for the proposed dams of the Carolina-Tennessee Power Company. When you can see the strata, there is, in some formations, a good deal of necessity to core drill it, if you are in a country where it is full of faults, as I have seen it in the western country. There you never know whether you have got boulders or solid rock until you have gone down into it. We usually go down twenty feet in the rock out there. If we go to twenty or twenty-five feet and do not find a faulty place we think we have rock, but in this foundation there is no fault and no slip in the formation. Sometimes the earth on one side of the chasm of the strata is 100 feet above the strata and that has to be drilled to see how far that has gone down. Take it in the lime-stone formation. You are apt to find the seepage of the water through and under it turns it to clay, and you may have a hard strata, six, twelve or twenty feet deep when you go into it. In carbonated lime of this sort it is very usual that we put down a drill and see if we have clay tacks or not. At the dam in Chattanooga they had a great deal of trouble with the foundation on that account, but this rock down here is a stratified rock.

Recross-examination:

At Chattanooga they lost, on account of the faulty foundations substantially \$1,000,000.00.

At this point the plaintiff rested.

The defendant demurred to the evidence and moved to dismiss the action and moved for judgment as of non-suit; the motion was overruled and the defendant excepted, the same being Defendant's Exception No. 4.

The defendant introduced the following evidence:

Defendant's Exhibit No. 1. Defendant first offers the charter of the Hiawassee River Power Company, dated June 30, 1914, filed July 13, 1914, in the office of J. Bryan Grimes, Secretary of State, recorded and filed July 16, 1914, in Book No. 1 of Incorporations, at page 260, copy of which is hereto attached.

Defendant's Exhibit No. 2. A contract of sale between Hugh F. Vandeventer and Anderson Coleman and his wife, Lucinda Coleman, dated June 28, 1913, and recorded July 2, 1913.

Defendant's Exhibit No. 3. The deed which followed that contract, the deed being made by Anderson Coleman and his wife, Lucinda Coleman to Hugh F. Vandeventer, the deed being dated the 1st day of July, 1914, filed for Registration July 15, 1914, in Book 28, page 316.

Defendant's Exhibit No. 4. A contract from W. J. Crane, et al. to H. F. Vandeventer, dated July 9, 1913, recorded July 12, 1913.

Defendant's Exhibit No. 5. A contract between W. A. Mashburn and Frances Mashburn and Hugh F. Vandeventer, dated June 28, 1913, registered in Book No. 27, Page 42, on July 12, 1913.

Defendant's Exhibit No. 6. A contract between Mary Rogers and others and Hugh F. Vandeventer, dated July 3, 1913, and registered in Book No. 27, at Page 450, on July 24, 1913.

Defendant's Exhibit No. 7. A contract between H. W. Rogers and Elizabeth Rogers, and H. F. Vandeventer, dated July 3, 1913, and recorded July 5, 1913, in deed book No. 27, Page 420, of the records of the County.

Defendant's Exhibit No. 8. A contract between O. F. Hunsucker and Lula Hunsucker and Hugh F. Vandeventer, dated September 1, 1913, and recorded November 5, 1913, in Book No. 27 of Deeds, Page 628.

Defendant's Exhibit No. 9. A contract between Joseph Whitener and Rebecca Whitener, and Hugh F. Vandeventer, dated February 5, 1914, recorded February 17, 1914, Book 28, Page 163 of Deeds.

Defendant's Exhibit No. 10. A contract between Julius Reed and his wife, Martha Reed, dated July 28, 1913, recorded July 12, 1913, in Book No. 27, Page 429.

Defendant's Exhibit No. 11. A contract between E. H. Nelson and his wife, E. J. Nelson, and Hugh F. Vandeventer, dated June

28, 1913, recorded in Book No. 27, Page 428 of Deeds on July 12, 1913.

Defendant's Exhibit No. 12. A contract between H. T. Hamby and Dorothea Hamby and other- to Hugh F. Vandeventer, dated February 6, 1914, and recorded in Book 28, Page 163, on the 16th day of February, 1914.

Defendant's Exhibit No. 13. A contract between W. A. Fair and his wife, S. T. Fair, and Hugh F. Vandeventer, dated April 10, 1914, in Book 28 of Deeds, Page 57, on the 11th day of April, 1914.

Defendant's Exhibit No. 14. A contract between Q. W. Stiles and his wife, Paralee Stiles, to Hugh F. Vandeventer, dated September 10, 1913, and recorded in Book No. 27 of Deeds, on Page 631, November 6, 1913.

Defendant's Exhibit No. 15. A contract of sale between William Hyatt and his wife, Mary Hyatt, and Hugh F. Vandeventer, dated March 13, 1914. Recorded in Book No. 28 of Deeds, Page 218, on March 17, 1914.

Defendant's Exhibit No. 16. A contract between R. S. Stiles and O. V. Stiles and Hugh F. Vandeventer, dated February 21, 1914, recorded in Book No. 28 of Deeds, Page 184, February 23, 1914.

Defendant's Exhibit No. 17. A contract between J. A. Burgess and his wife, Ollie Burgess, and Hugh F. Vandeventer, dated February 20, 1914, and recorded in Book No. 28 of Deeds, Page 185 on the 24th of February, 1914.

Defendant's Exhibit No. 18. The deed from J. A. Burgess and wife, Ollie Burgess, and W. O. Stiles and her husband, Sherman Stiles, dated March 4, 1914, recorded in Book No. 28 of Deeds, Page 211, on March 10, 1914.

Defendant's Exhibit No. 19. A contract between W. H. Johnson and Florence Johnson and Hugh F. Vandeventer, dated January 19, 1914, and recorded January 22, 1914, in Book 28 of Deeds, Page 117.

Defendant's Exhibit No. 20. The contract between W. K. Johnson and his wife, Florence Johnson, and Hugh F. Vandeventer, dated January 15, 1914, recorded in Book No. 28 of Deeds, Page 116 on the 22d day of January, 1914.

Defendant's Exhibit No. 21. A contract between W. S. Roberts and S. C. Roberts and Hugh F. Vandeventer, dated March 25, 1914, and recorded in Book No. 28 of Deeds, Page 73, July 20, 1914.

Defendant's Exhibit No. 22. A contract of sale between Jacob Davis and his wife, Sarah Ann Davis, and Hugh F. Vandeventer, dated September 6, 1913, recorded in Book No. 27 of Deeds, Page 624, November 5, 1913.

Defendant's Exhibit No. 23. The deed from Victoria James to H. F. Vandeventer, dated April 27, 1914, and recorded in Book No. 28, Page 361, July 16, 1914.

Defendant's Exhibit No. 24. The deed from Victoria James to Hugh F. Vandeventer, dated April 27, 1914, and recorded in Book No. 28, page 362, July 16, 1914.

Defendant's Exhibit No. 25. Defendant next offers in evidence bond for title; it is claimed from W. L. Fain and his wife, Fannie

Fain, and John E. Fain and wife, Tommie Fain, R. M. Fain and wife, Mary Fain, A. McD. Harshaw and wife, Florence; Jasper L. Fain and A. J. Fain and wife, Ida Fain, the heirs of M. Fain, to the Hiawassee River Power Company, dated July 18, 1914, recorded in Book No. 28 of Deeds, Page 468, September 4, 1914.

The plaintiff objected to the introduction of this bond for title upon the ground that it appeared to have been registered after the institution of this action.

The objection was overruled, and plaintiff excepted, the same being Plaintiff's Exception No. 1.

Defendant's Exhibit No. 26. A contract between W. B. James and Lola Hartness James to the Hiawassee River Power Company, dated July 24th, 1914, recorded in Book No. 28 of Deeds, Page 388, July 25th, 1914.

Defendant's Exhibit No. 27. A contract of sale from Lola Hartness James, W. P. James and others to the Hiawassee River Power Company, dated July 24th, 1914, and recorded in Book No. 28 of Deeds, page 388, July 25th, 1914.

Defendant's Exhibit No. 28. An option to J. P. McMullen from P. E. Nelson and Emma Nelson, dated December 23d, 1912, registered in Book No. 27 of Deeds, page 57.

Defendant's Exhibit No. 29. The deed dated the 3d day of July 1915, by and between Hugh Rogers and wife, Elizabeth Rogers, to the Hiawassee River Power Company, conveying the land described in the deed, for a consideration of \$3,000.00, the deed being registered in Book No. 29 of Deeds, on page 210, on 9th day of July 1915.

The plaintiff objected to this evidence upon the ground that the deed was executed and the alleged consideration therein mentioned was paid after the beginning of this action.

The Court ruled by the admission of the parties, the suit was begun on August 21, 1914, and the deed offered in evidence was executed on the 3d day of July, 1915, after the filing of the petition in this case, the objection of the plaintiff was sustained and the evidence excluded.

To this ruling of the Court the defendant excepted, the same being Defendant's Exception No. 5.

Defendant next offered in evidence deeds, which it was admitted were executed after the beginning of this action by the plaintiff against the defendant; that is, were obtained by the defendant after August 21, 1914, the date of the commencement of this action. These deeds were offered first, to show the relative situation of the parties at this time as to the ownership of lands along the banks of the Hiawassee River, in order that the existing rights of the parties relative to the properties upon the banks of the Hiawassee River at the date of this trial, may be determined. The defendant offers these deeds in the second place as illustrative of its good faith in this matter, in the development of its water power proposition on the Hiawassee River, and of its continuing purpose to carry out the plan

and purposes of its organization. In the third place, these deeds are offered also to show that the defendant Company complied with each and all of the contracts of purchase and sale of properties upon the Hiawassee River, which contracts had theretofore been introduced in evidence. These deeds were as follows:

The first deed is a deed from Hugh Rogers and wife to the Hiawassee River Power Company, dated July 3, 1915, and recorded August 9, 1915, in Book 29 of Deeds, Page 340.

Deed from E. E. Stiles and wife, Myrtle Stiles, to the Hiawassee River Power Company, dated June 2, 1915, recorded in Book 29 of Deeds, Page 296, June 2, 1915.

Deed from W. P. James and Lola Hartness James, guardian, to the Hiawassee River Power Company, dated January 13, 1917, and recorded in Book of Deeds No. 67, Page 476, on January 20, 1917.

Deed from W. M. Hyatt and wife, Mary Hyatt, to the Hiawassee River Power Company, dated March 10, 1916, and recorded in Book No. 67 of Deeds, Page No. 10, on March 17, 1916.

Deed from W. A. Mashburn and wife to the Hiawassee River Company, dated November 16, 1914, recorded in Book 29 on Page 30, December 22d, 1914.

Deed of Mary Rogers, et al., to the Hiawassee River Power Company, dated July 3, 1915, recorded in Book No. 29, Page 351, July 20, 1915.

Deed from O. F. Hunsucker and wife to the Hiawassee River Power Company, dated September 1, 1915, recorded in Book No. 29, Page 408, September 1, 1915.

Deed from Julius Reed and wife, Martha Reed, to the Hiawassee River Power Company, dated April 5, 1915, and recorded in Book No. 29, Page 249, April 23, 1915.

Deed from Joseph L. Whitener and wife to the Hiawassee River Power Company, dated May 27, 1916, and recorded in Book No. 67, Page 156, May 20, 1916.

Deed from E. H. Nelson, and wife, to the Hiawassee River Power Company, dated April 3, 1915, and recorded April 21, 1915, in Book No. 29, Page 233.

Deed from H. T. Hamby and others to the Hiawassee River Power Company, dated January 10, 1917, recorded in Book No. 67, Page 477, January 22, 1917.

Deed from W. A. Fair and wife to the Hiawassee River Power Company, dated April 25, 1916, and recorded in Book 67, Page 119, April 26, 1916.

Deed from Q. W. Stiles and wife to the Hiawassee River Power Company, dated September 2, 1915, and recorded in Book No. 29, Page 411, September 3, 1915.

Deed from W. H. Johnson and wife to the Hiawassee River Power Company, dated January 18, 1916, and recorded in Book No. 65, Page 600, January 27, 1916.

Deed from W. S. Roberts and wife to the Hiawassee River Power Company, dated July 3, 1916, and recorded in Book No. 67, Page 215, July 7, 1916.

Deed from W. M. Cooper and T. J. Cooper, executors, to the Hiawassee River Power Company, dated December —, 1914, and recorded in Book No. 29, Page 81, January 11, 1915.

Deed from Lon Raper and wife to the Hiawassee River Power Company, dated December 3, 1914, and recorded in Book No. 29, Page 84, January 11, 1915.

Deed from Lon Raper and wife, and T. M. Raper, to the Hiawassee River Power Company, dated the 28th of December, 1914, and recorded in Book No. 67, Page 436, January 2, 1917.

Deed from J. M. Martin and wife to the Hiawassee River Power Company, dated March 29, 1915, and recorded in Book No. 29, Page 242, April 21, 1915.

Deed from G. W. Hartness and wife to the Hiawassee River Power Company, dated February 12, 1917, and recorded in Book No. 67, Page 515, February 15, 1917.

Deed from W. J. Crain and others to the Hiawassee River Power Company, dated the 10th day of July 14, 1915.

Deed from W. J. Crain, guardian, to the Hiawassee River Power Company, dated July 10, 1915, and recorded in Book No. 29, Page 347, July 14, 1915.

Deed from W. J. Crain and S. A. Crain and others to the Hiawassee River Power Company, dated July 3, 1915, and recorded in Book No. 29, Page 348, July 14, 1915.

Deed from Jacob Davis and wife to the Hiawassee River Power Company, dated September 1, 1915, recorded in Book No. 29, Page 409, September 1, 1915.

Deed from W. K. Johnson and wife to the Hiawassee River Power Company, dated January 27, 1917, and recorded April 5, 1917, in Book 69, Page 8.

174 Deed from W. B. Raper, to the Hiawassee River Power Company, dated December 11, 1914, and recorded in Book No. 299 Page 82, July 11, 1915.

Deed from W. B. Raper and wife, et al., to the Hiawassee River Power Company, dated December 21, 1916, and recorded in Book No. 67, Page 428, December 27, 1916.

Defendants also offers in evidence a contract of sale made by W. H. Reece and his wife to the Hiawassee River Power Company, dated the 31st day of December, 1914, conveying certain lands consisting of two tracts along the Hiawassee River which are described in the contract of sale, the purchase price agreed upon being \$2,100.00 \$700.00 of which sum is recited as paid, and the balance is payable as shown in the contract. This contract is recorded in Book No. 29, Page 61, December 10, 1914.

The deeds named were all deeds covering property along the Hiawassee River, bought by the defendant in connection with its proposed water power development upon that river, and covering lands adjacent to its proposed dam sites upon said river, and the land necessary and the lands making up the portions of its reservoir basins to be established in connection with the water power development upon said river.

To the introduction of all the foregoing deeds and contracts, the

plaintiff objected upon the ground that said deeds and contracts were executed after the institution of this action, and the same reasons were advanced by defendants' counsel for the introduction of these deeds and contracts as were advanced for the introduction of the deeds from Rogers and wife to the defendant, involved in this defendant's exception No. 5.

The plaintiff objected to the introduction, and admission of these deeds and contracts on the ground that all said deeds and contracts were executed after the institution of this action.

It being admitted by the parties that said deeds and contracts were executed after the institution of this action, the plaintiff's objection was sustained and the defendant excepted and set forth this ruling as its Exception No. 6.

The defendant next introduces a deed from H. F. Vandeventer to the Hiawassee River Power Company, dated July 15, 1914, and recorded July 18, 1914, in Book of Deeds No. 28, Page 365 to 370, as Defendant's Exhibit No. 29, a copy of which Exhibit is attached.

HUGH F. VANDEVENTER, sworn for the defendant, testified as follows:

My name is Hugh F. Vandeventer. I live at Knoxville, Tenn. I am President of the Hiawassee River Power Company. I first came to Murphy in the early part of 1912. At that time I was looking for power to be used in connection with a paper mill and I was seeking water power for the purpose of that paper mill. At that time I came here with Mr. Chapman, an engineer from Chicago, whom I had engaged to report on this paper mill proposition, and he and I came here and walked down the river, not a great distance, and spent a day and a half or two days here. In connection with that paper mill proposition, I investigated the timber resources in Swain County and several other places. In the fall of 1912 we begun some cruising and some investigation of timber. In the early part of 1913 we sent Mr. Mullen here. Mr. Mullen is an engineer, and an employee of Mr. Chapman, and he was sent here to make the surveys of the river. Mr. Chapman, the engineer from Chicago, had the water power on the Hiawassee River examined by Mr. Mullen. Mr. Chapman made me a report in connection with the paper mill. His report was received by me sometime in March, 1913. Mr. Mullen reported to me as having investigated three dam sites on the Hiawassee River; these dam sites were Shoal Creek, Coleman and Persimmon Creek dam sites. The Shoal Creek dam site, as reported by Mr. Mullen, was between the Nelson and Hamby properties. On the map the dam site at Shoal Creek is on the extreme left of the map as you face it, between the line marked Nelson and Hamby; Shoal Creek is below the dam site. The Coleman dam site, as reported to me by Mr. Mullen, is between the Coleman and Mashburn lands. This shows a little to the left of the center of the map and is between the land marked Coleman and Mashburn. The Persimmon Creek dam site was between the land of Hugh Rogers and the land either of John Green or Carroll. When Mr. Mullen

was here he furnished me with cross-sections and other evidence of his work at Shoal Creek dam site and the Coleman dam site. These were pencil sketches; the pencil sketches have been reproduced and are now blue prints. Mr. Mullen in about March, 1913, furnished me a pencil sketch; this pencil sketch is now in the possession of B. H. Hardaway of Columbus, Georgia. This print is a copy of the cross-section of the Coleman dam site that was furnished to me. Mr. Mullen furnished me a pencil sketch, drawing the scales so I could use it with Mr. Hardaway in figuring the estimates. This blue print is made from the original of Mr. Chapman's report. There is no difference between that map and the map furnished by Mr. Mullen in 1913; the dimensions were the same and the lines were the same. This paper is a blue print of the cross-section of the Hiawassee River of the dam site proposed to be located 2000 feet down stream from the mouth of Mill Creek on the Coleman land. It was made from the original tracings. Mr. Mullen had tracings made from the surveyor's notes and furnished me with these blue prints. Mr. Mullen reported to Mr. Chapman and Mr. Chapman furnished me the blue prints.

177 T. C. MULLENS, a witness sworn for the defendant, was here introduced for the purpose of identifying the blue prints and testified as follows:

I am the engineer sent here by Mr. Chapman in 1913 to investigate certain water powers on the Hiawassee River. The blue print showing me is one that I made. The draftsman under me made it. It was made from my tracings of the notes taken in the field. I had this other blue print showing the Shoal Creek dam site made. It was made from my notes and checked by me. The actual work was done by a draftsman.

Cross-examination:

I made the survey of the lands and waters indicated on this blue print. I was in charge of the work. The survey of this was made at the dam site. I do not know the exact date of the making of the blue print. I think it was made in March, 1913. It was made at the time it purports to have been made. The one marked Coleman dam site is dated March 27, 1913. That is when it was made. The other one marked Shoal Creek dam site was the same date and was made then. Before I made the blue prints, I made the tracings. We have the tracings here. You can make blue prints from tracings at any time after the tracings are made. Blue prints can be made afterwards at any time after the tracings are made. The blue prints are made when the tracing is made and that is what we make them for. That is the object of making the tracings. The blue prints were made from our survey.

The witness VANDEVENTER, then resumed the stand, and continued to testify as follows:

I also received from Mr. Chapman the profile of the Hiawassee River from Murphy, North Carolina, to Appalachia, Tennessee,

connection with his report and a profile of the Nottley River in connection with his report. Mr. Chapman also furnished me with his contour maps. This blue print is a contour map of the Shoal Creek dam site which was furnished me in connection with this investigation and report. Mr. Chapman also furnished me a blue print which was a contour map of the Coleman dam site in connection with his report. After Mr. Chapman made his report to me, the next step that I took in this water power proposition on the Hiawassee River was to employ Mr. McLelland to make a property map: Mr. McLelland is a surveyor living at Murphy. He was employed the last of May, 1913. This paper is a blue print of the map made by Mr. McLelland; it is a blue print of Mr. McLelland's original tracing. This map was furnished to me by Mr. McLelland during the last week in June, 1913. I had reached Murphy at that time. This map shows certain portions marked in red and some in yellow. These colors have been put on since the map was furnished by Mr. McLelland. The map is a blue print of the original, so far as the lines and directions are concerned. It is a map made and furnished by Mr. McLelland as the property map of the property up and down the Hiawassee River.

The defendant here introduces in evidence this McLelland map as the Defendant's Exhibit No. 33, a copy of which is attached.

I first sent Mr. McMullen here on a preliminary trip during the summer or early fall of 1912. He came back here during the fall of 1912, I should say in October or November. He stayed here practically all of the time until about July first, 1913. He obtained options upon land along the river during that time and reported these options to me. We did not exercise all of the options taken by Mr. McMullen. Mr. McMullen's options were nearly out at the time I had the property map made. I did not want to buy them because I had no idea of the frontage of the river and I wanted to see what land they had before I could tell what the price of the property was, before I could get an idea of the frontage and an idea of level. I could not estimate the survey of the land as held under these options until I had a property map made. The book shown me is the report that I received from Mr. Chapman. After I received the report from Mr. Chapman and after the map had been made by Mr. McLelland, I determined about the development of the water power on the Hiawassee River at Shoal Creek and Coleman dam site and intended to take up and develop the Shoal Creek and Coleman location and work them out. After I had the McLelland map and reached this determination about these two dam sites, we bought property about the middle of July or a little before the first of July, 1913, certain properties at the Coleman dam site. The land on the map marked Coleman and the land on the map marked Mashburn are the lands between the proposed Coleman dam site. The W. P. James land is on the south side of the river. The land of the Victoria James heirs is on the extreme end of the map. The Jacob Davis land is on the south side of the river, south of the Roberts land. The Brooks tract is adjoining the Fowler land or

right across the river. The Rogers tract is opposite the land of John Green. The Julius Reed tract is east of the E. H. Nelson tract adjoining the Crain tract on the south side of the river. There were two Hunsucker tracts, one on the north side of the river west of the Roberts tract, and the other on the south side of the river east of the Jacob Davis land. The Joe Whitener tract is on the north side of the river opposite the John Stiles land. The H. T. Hamby tract is on the north side of the river at the Shoal Creek dam site; it extends east to the point about opposite the Crain lands. One end of it, the west end of it, is near the Shoal Creek dam and is a part of the Shoal Creek dam site on the north side of the river. There are two Stiles tracts, one on the north side of the river opposite the Whitener's land marked John Stiles, and the other is on the south side of the river east of the Jacob Davis land across from William Ramsey's land. The W. A. Fair tract is on the south side of the river opposite to the land of Jake Burgess and Joe Whitener. The W. H. Johnson tract is on the south side of the river east of Bearpaw Creek. The W. K. Johnson tract is on the south side of the river east of the Raper land and on Beach Creek. The W. M. Hyatt land is on the north side of the river adjoining the Coleman land on the east. The Stiles land, designated as John Stiles, is on the north side of the river opposite the Whitener's tract. The Victoria James land is shown on the map. The E. H. Nelson tract is on the south side of the river west of the lands of Julius Reed. The J. A. Burgess tract is on the north side of river adjoining the land of Joe Whitener and Martin. The W. S. Roberts land is on the north side of the river at Grape Creek. The tracts named are marked in red on the map. At the time this suit was brought we had either deeds or contracts of sale to the land on each side of the two dam sites for Shoal Creek and Coleman dam sites. After I got the map from Mr. McLelland in 1913, I took a trip down the Hiawassee River on June 27, 1913, with Mr. McLelland and Mr. Nelson. We spent the night at Hamby's. Hamby owns the land designated on the map as adjoining the Shoal Creek dam site. I made no trade with Mr. Hamby on that trip. I bought his land about seven months afterwards. On that first trip I bought the Crane land, also the Coleman and Mashburn and Julius Reed and E. H. Nelson. The Coleman and Mashburn lands are the two lands on the opposite side of the river at the Coleman dam sites. I am not positive whether we had Mr. McLelland's maps with us on that trip. I employed Mr. Charles O. Lenz about April, 1914, to make a report on the water power at the Coleman dam site and the Shoal Creek dam site on the Hiawassee River. Mr. Lenz is a Hydraulic engineer, very widely known and with an excellent reputation. This paper is a copy of his report; it was furnished me about June 20, 1914. I employed him to report the water power at Coleman and Shoal Creek dam sites, and that is the report that he made to me. In 1913 I knew that a suit had been filed for a Receiver against the Carolina-Tennessee Power Company, and I knew that they owned some property on the Hiawassee River and knew they had some deeds and they had some old options. I knew nothing of any work of any kind in

the way of surveying or building dams or any other kind of work on the Hiawassee River that Company had done. The only direct knowledge that I had was that the Receiver had been appointed and they had certain deeds and certain options. I happened to be here at the time the Receiver was applied for. I do not recollect any information during 1914 that I had or any knowledge that I had of any activities of the Carolina-Tennessee Power Company prior to the organization of the Hiawassee River Power Company. I recall a visit that I made to the office of Mr. Norvell about February, 1914. I was here about the 24th, 25th, and 26th of February, 1914. Mr. Norvell came to Mr. Nelson's office and said he would like to see me at his office and when I went there he asked me if we had bought the land of Jacob Davis and if we would like to sell it. I told him no, we would not sell it. He said then that he had been instructed to condemn it. I told him that of course we would resist that. He said: "Why don't you go to see those people?" And I said: "What people?" He said: "Mr. Ketcham and Mr. Rice." I asked him the question if they would sell. He said he did not know whether they would or not or what they would do. I told him that I was going to New York on another matter in the course of two or three weeks, that I was interested in an estate on Long Island, a small estate that had to be settled and that I did not object to going to see them if he thought there was any possibility of their selling and he rather exacted a promise of me that I would go. I went to see them when I went up in New York in the course of two or three weeks, after that, I don't think it was over twenty-five minutes of business talk; the rest of the time we were talking, Mr. Norvell asked me where I was from and so on, and I told him and we talked about Virginia. I called on Mr. Ketcham when I was in New York about two or three weeks after that, and I wrote Mr. Norvell the result of my talk after I returned. When I saw Mr. Ketcham, he told me that his lawyer was not in that morning, that he had had a letter from Mr. Norvell, and that his lawyer was not there and he would like for him to be there when anything was discussed. I told him also about being obliged to go to Long Island and it was arranged that I should come back in two or three days, I think the following Tuesday. I came back on the following Tuesday and there was nobody in the office but a young man, the office boy, I presume, and he told me that Mr. Ketcham was not in, and Mr. Rice was not in; that is as I recollect it happened, that Mr. Rice had not come down yet and I told him that I would go out and be back in about a half an hour. I did come back in about a half an hour and he told me that they were not there and he was not sure whether they would be there that day or not, and I told the boy that I was at the Belmont Hotel and would be at the Belmont Hotel until 3 o'clock and if they cared to see me they could telephone me there until that time. In January, 1914, I negotiated for the W. H. and W. K. Johnson places. I negotiated for the Fowler tract through Mr. Nelson. I did not negotiate for it myself. The book shown me is the minute book of the Hiawassee River Power Company.

183 Defendant introduced the minutes of the meeting of stock holders of the Hiawassee River Power Company of July 15, 1914, as Defendant's Exhibit No. 32, a copy of which is attached.

Defendant introduced minutes of the meeting of the Board of Directors of the Hiawassee River Power Company, dated July 15, 1914, as Defendant's Exhibit No. 33, a copy of which is attached.

The Witness Vandeverter continued to testify:

The deed introduced in evidence as Defendant's Exhibit No. 29, the same being deed from me to the Hiawassee River Power Company, of July 15, 1914, was made in accordance with the action of the stock-holders of the Hiawassee River Power Company under their resolution of July 15, 1914, which is Defendant's Exhibit No. 32.

At that stock-holders' meeting we had Mr. Lenz's report and Mr. Chapman's report and Mr. McLelland's map. We had the contracts for lands that have been introduced here. The contracts, maps and reports were turned over to the Hiawassee River Power Company under the terms of the stock-holders' resolution of July 15, 1914. Relative to exactly what transpired on July 15, 1914, concerning the acceptance or the assent by all the stock-holders present of the two dam sites proposed, the one at Shoal Creek and the one at the Coleman dam site, we met in Mr. Dillard & Hill's office and I turned over Mr. Lenz's report, Mr. Chapman's report and Mr. McLelland's maps. We had them at the meeting. Everybody looked at the reports and the map. We discussed the question of core drilling the two dam sites and of condemning the property for both sides. I am not willing at this late date to swear positively what was said and done on a thing like that. At that meeting I presented to the other stock-holders present and called their attention to the location of the two dam sites, the one at Coleman dam site and the one at Shoal Creek. At that meeting the question of core drilling the two

184 dam sites was discussed, these two special sites, the one at Coleman and the one at Shoal Creek. Mr. Lenz recommended that they be core-drilled, and I had had before the meeting interviews with the Sullivan Machinery Company of Knoxville. I recommended that the two dam sites be core-drilled. The paper handed me is a contract with the Sullivan Machinery Company of Chicago, Illinois, by the Hiawassee River Power Company.

Defendant introduced in evidence the contract between the Sullivan Machinery Company and the Hiawassee River Power Company, as Defendant's Exhibit No. 34, a copy of which is hereto attached.

The witness Vandeverter continued to testify:

This contract was made in Knoxville, Tenn. It was signed by me for the Hiawassee River Power Company and by Mr. Thomas for the Sullivan Machinery Company. The Sullivan Machinery Company manufactures Air Compressor Drills and coredrills and does drilling on contracts. Turtletown mentioned in the contract is a station on the Louisville & Nashville Railroad between Blue Ridge and the loop on the Louisville & Nashville Railroad. Mr. Fitzgibbon was in

charge of the core-drilling for the Sullivan Machinery Company. I instructed him to do the drilling sometime between the 4th of August and the 13th of August, and to drill the dam site on the River at Coleman and the Shoal Creek dam site. In the minutes of the Company it was resolved to condemn the Fowler land. In the petition in this case there is written the entry of filing: "Filed July 15, 1914, at 1 o'clock P. M., A. A. Fain, Clerk Superior Court"; and the additional entry: "Filed July 16, 1914, 8:17 o'clock A. M., A. A. Fain, Clerk Superior Court." As to why that paper was filed first, my recollection is that the original paper was taken out to be amended, the contour lines named in the paper being amended and the petition was re-filed the next morning. I was here at the time this Fowler suit for condemnation was filed. The Company passed a resolution to condemn it.

The defendant here introduced the following papers and portions of records in the case of the Hiawassee River Power Company vs. Fowler:

Defendant's Exhibit No. 35. Summons dated July 15, 1914; the petition together with the entries of filing upon it, the amended petition filed August 19, 1914, and map which was filed August 20, 1914, as Defendant's Exhibit No. 35, which suit sought to condemn that portion of the Fowler land, within certain contour lines necessary for defendant's proposed development.

Defendant's Exhibit No. 36. Defendant next introduced in evidence the portions of the record in the case of the Hiawassee River Power Company vs. J. M. Martin, to-wit. summons dated July 17, 1914; petition filed July 17th, 1914; the amended petition filed August 19th, 1914; and the map and profile filed August 20th, 1914, a copy of which is hereto attached.

Defendant's Exhibit No. 37. Defendant next introduced in evidence record in condemnation suit brought by the Hiawassee River Power Company against John Green, showing summons issued July 17th, 1914; the petition filed July 17th, 1914; summons and petition served on defendant July 24th, 1914; amended petition filed August, 1914; motion to remove to Superior Court, filed August 31st, 1914; answer filed August 31st, 1914; replication filed September 16th, 1914; proceedings heard before Clerk November 14th, 1914, all issues found in favor of petition, and damages for land sought to be condemned assessed at \$1540.00. Exception and appeal by defendant. The lands condemned were to a certain contour line and were necessary for the defendant's proposed development.

Defendant's Exhibit No. 38. Defendant introduced in evidence the case of the Hiawassee River Power Company vs. Hayes, the summons dated July 6th, 1914; the petition filed July 17th, 1914.

Defendant's Exhibit No. 39. Defendant introduced in evidence the case of the Hiawassee River Power Company vs. W. D. Raper and H. D. Spalcup; the summons dated July 17th, 1914; the petition filed July 17th, 1914; the amended petition filed August 19th, 1914.

Defendant's Exhibit No. 40. Defendant introduced in evidence the case of the Hiawassee River Power Company vs. T. M. Raper and Lon Raper; two summons, one dated August 6th, 1914, and the other dated July 20th, 1914; and two petitions, one filed July 20th, 1914, and the other filed August 6th, 1914. The map was filed on the date the suit was filed. Amended petition was filed on August 19th, 1914. The land sought to be condemned was within certain contour lines and was land necessary for the defendant's proposed development.

Defendant's Exhibit No. 41. Defendant introduced in evidence the case of the Hiawassee River Power Company vs. T. L. Johnson, summons dated July 21, 1914; petition filed July 21, 1914, the amended petition filed August 14, 1914, and the map filed August 21, 1914.

The witness Vandeventer continued to testify as follows:

I have a statement showing the lands upon which the Hiawassee River Power Company have deeds and which were transferred to the Hiawassee River Power Company prior to August 21, 1914. The deeds we have are for three tracts; they are for the Coleman tract and the Victoria James lands, embracing two hundred and twenty-eight and a half acres, with a river frontage of 5700 feet. This

statement also shows the contracts and the amount of land embraced in the contracts of purchase by the Hiawassee

187 River Power Company as of date August 21, 1914. The price contracted to be paid for the lands under contract of sale by the Hiawassee River Power Company at the date of suit was \$34,940.00. Of this amount \$14,048.34 had been paid up to August 21, 1914. The contracts of sale embraced 2,005.1½ acres, with a river frontage of 70,760 feet which is 13.4 miles. The frontage in miles of the lands held under deed of August 21, 1914, is 1.08 miles. The Hiawassee River Power Company held under deeds and contracts of sale 14.48 miles of frontage at the date the suit was filed. The Hiawassee River Power Company, prior to the suit, had condemned the Hayes land with a river frontage of 2,850 feet, and the Martin land with a river frontage of 1,925 feet; the W. B. Raper land with a river frontage of 4,675 feet; the T. M. Raper land, 3,825 feet, and the Fowler land with a frontage of 27,655 feet; the Green land with a frontage of 11,650 feet and the Johnson land with a frontage of 8,740 feet. The land condemned prior to the suit has a frontage of 61,320 feet or a frontage in miles of 11.61 miles.

At this point the defendant offered to prove by the witness Vandeventer that on all the contracts for lands held by the Hiawassee River Power Company, which had been offered in evidence in this case, which was made prior to the beginning of this suit and which calls for payments after the suit was filed, that all such payments had been made by the Company as they fell due.

The Plaintiff objected to this as to all payments proposed to be proven as made since the institution of this action.

The objection was sustained and the evidence was excluded and the defendant excepted and assigned this as Defendant's Exception No. 7.

88 The witness Vandeventer then continued to testify as follows:

Mr. Chapman was paid \$2,650.00 for his report, and Mr. Lenz 1,000.00 and expenses for his report. I cannot state positively, without the bills and books, if the Sullivan Machinery Company was paid anything prior to the institution of this suit. We did pay them for work done prior to August 21, 1914, as per the terms of the contract. There was invested by me for the Company prior to the 21st day of August, 1914, on this water proposition, approximately \$60,000.00. That includes the timber cruises, surveying the timber land, and the Murphy expenses, lands and legal expenses and all other expenses. Relative to what was invested in the water power proposition prior to the institution of this suit, as near as I can figure, there was about \$35,751.00 invested in lands and elements that went into the Murphy expenses alone. From the time of the organization of the Company up to the date of the bringing of this suit there was a little more; there was the expenses at Murphy and the amount of supplies and things like that sent down there for corerillings. This additional amounts to about \$1,457.70. We started out on this proposition as a paper mill proposition; that is still in abeyance. From that proposition we went into the proposition of developing the Hiawassee River. It was my purpose, as an officer of the Hiawassee River Power Company, to execute the powers of the company granted by its charter. I got \$90,000.00 of this stock of 100,000.00 of the Hiawassee River Power Company for my work and land. All the money that was put up on this proposition was my money. The arrangements that I made for developing were not made prior to the institution of this suit.

89 At this point the witness Vandeventer was asked this question: "Mr. Vandeventer, as an officer of the corporation, if you were allowed to do so, would you carry out this proposition and build these dams?"

To this question the plaintiff objected and the objection was sustained; the defendant excepted and assigned the exclusion of evidence by the Court as Defendant's Exception No. 8.

Cross-examination:

I have had no degrees in engineering, except in metallurgy and mining. I graduated in metallurgy a great many years ago. I am neither an electrical engineer nor hydraulic engineer. When I first came to North Carolina I was looking for power for a paper mill. I was looking for spruce wood as raw material. I examined the Harwood-Woodbury tract of land in Swain County and the Southern Spruce Company's tract of land in Swain County. From Swain County I went to Cherokee County. I examined no lands here for the pulp mills. We came by Asheville, stopping at Waynesville. On this same trip we went to Asheville and then to Waynesville and Bryson City and Forney's Creek and then came on here. I did not look for any timber for a paper mill in Cherokee County.

I looked for power for a paper mill here. A paper mill cannot be operated without power. At that time I spent a day and a half on the Hiawassee River in the early part of 1912. What I was doing at that time was investigating timber. We did not look at any timber tracts or talk to anybody else about timber tracts on that trip. The timber tracts that we contemplated at that time were somewhere else. The Hiawassee River first attracted our attention as a paper mill proposition. We had it surveyed by Mr. Chapman with a view of establishing a paper mill. The work done by Mr. Mullen was with a view of
190 obtaining power for a paper mill. We figured on making it a news print paper mill which requires a good deal of power. The work that Mr. Lenz did was not done with a view of establishing a paper mill. I had changed my purposes from a paper mill to something else. We found there was no more power, we could develop more power than we could use for the paper mill and it was a question of taking care of the power itself in the first development, and taking the secondary power for the mill and selling the primary power to the public. I made no written memorandum when the plan was changed. We required about 8,000 horse power for the paper mill. That is a pretty good power for a 24 hour power. I was not along on the river with Mr. Mullens when he made any surveys. I was here in Murphy. I did not see him make any surveys. I did not see him do anything; I met him here and talked to him. Mr. Mullens was down on the river working on this proposed paper mill proposition about three weeks, I believe. He came here on two trips; the first trip was a very short preliminary trip, and the trip that he did work, he was there about three weeks. Mr. Mullens, through Mr. Chapman, made his report subsequently. I paid \$2,650.00 for that in connection with the paper mill work. I never separated the worth of the work done on the river and for the paper mill by Mr. Mullens. Mr. Chapman had done more or less work on the paper mill from the early part of the year about January or February, 1912, until the time Mr. Mullens did his work. I cannot make any division of the paper mill work between the paper mill proposition and the water power proposition, as to what portion it was that I paid. I did not go down on the river with Mr. Mullens; I did not see him do the surveying. The paper mill was first based on the Persimmon Creek dam site. That kind of a paper mill is still based on the Persimmon Creek dam site. This
191 dam site would just simply supply the mill; then we changed from that proposition to take the water power as a water power proposition and use what power we needed for a paper mill. The Persimmon Creek dam site would not develop more power than was needed for the paper mill. I do not know whether, in the lowest stages of the water, Shoal Creek dam site would develop more power than was necessary for the paper mill or not. The Shoal Creek dam site is a lower dam site. We did not expect to use the secondary power when we first started. We tried to figure on the secondary power under a contract with an-

other party and found that we could not make it do. It first came to my mind to build two dams and maintain two stations on the Hiawassee River after Mr. Chapman made his report in the latter part of March, 1913. Mr. McLelland did his work on the river in May, 1913. He was engaged in that work possibly three weeks. I sent Mr. McMullen here in the fall of 1912 to take certain options for me. I do not know how many options he took. The options, as I recall, were for 90 days on the first options and most of them were renewed for 90 days, which made them expire about the first of July, 1913. Some of them were renewed in writing. According to my recollection, I testified in this case at the prior trial. I do not recall having testified that I did not take up a single one of the options taken by Mr. McMullen. I think Mr. Nelson took up some of them. Now, I am under the impression that the options expired the first of July, 1913, and if this is the case, I took up the Coleman, Mashburn and Crane and Nelson lands. If all the options expired on the first day of May, 1913, we did not take any up. The first land that we bought and paid for was the Nelson land, which was about June 1, 1913. I think the Anderson Coleman tract was bought on June 28, 1913. The first money paid for land was paid to Mr. Nelson. I believe Mr. McMullen took the option from Mr. Nelson in his name. The Nelson 192 contract is dated June 12, 1913. There were options on both tracts that expired on July 1st. My recollection is that I paid Mr. Coleman the same price that is in the option. If his option expired on May 1st, I did not take it up, prior to its expiration. I do not know what Mr. McMullen had paid Mr. Coleman. The option will recite. I know it to be a fact that at the time I paid Mr. Coleman on his contract and Mr. Nelson on this contract that I had absolutely no interest in any of this property on the river. I could have taken the property up under the Coleman option. If it had expired I could not; if it had not expired I could. I don't think it had expired; my recollection is that it expired the 1st of July. On the same date, June 28, 1913, I took an option from Julius Reed and a contract from Mr. Mashburn. I do not know that Mr. Powellson had just gone down on this river to examine that power three days before that. I do not recollect that I was informed that Mr. Powellson had just gone down on this river to examine that power three days before that. I did not come in here to take up these options at that time simply because I heard that Mr. Powellson had gone down on this river to examine that power. I came here just at that time to take up the properties because the first of May or June I told Mr. Nelson and Mr. McLelland to go down on the river and survey it and that I would come back as soon as they had the maps finished. Mr. Nelson was anxious to take up some before the options ran out. We wanted this piece there, the Hamby land, and when I saw the price of the Hamby land I could not pay it, and the reason I had to come back about that time; I promised them when they finished the map and we could see everything on paper I would come back and we could take up the options, those of them that were good,

In the former trial I was asked the question: "You did not take up any of them, did you?" (referring to the McMullen options), and I answered: "I do not know, I do not recollect."

I did not then recollect; I do not recollect now, only I think that was three days before they expired. My recollection is they expired the 1st of July. I did not recollect it then because it was not fresh on my mind. I recollect it now in connection of their going to make this map and my promise to Mr. Nelson that I would do it. I would not swear that we took it up right now. I think we did. I did not pay the dollar named in the option, of Anderson Coleman and wife to McMullen, dated the 18th day of July, 1912. I suppose Mr. Nelson did. The Coleman option recites that if any one of these are not taken up on its due date, and it will become null and void. Based on that, I should say there was an extension to that option. There were extensions to some of them. They were in writing. I will try to get the writings if you will let me get the papers. They are there. I will be glad to show that there is an extension. I did not make a separate and distinct contract relative to these lands because the terms were different. The price was the same but the terms of payment were different.

I do not know that the McMullen options were taken for the purpose of authorizing McMullen to sell these lands. It was not our purpose in taking these options to sell the land; it was our purpose to use them along in the way we intended, for the paper mill. The options provide that McMullen may make a bona fide contract and sale of the foregoing described property and that it may be extended to enable McMullen to conclude the sale. I presume the purpose of putting that clause in the option was to permit the sale to the paper mill company which we contemplated at that time. I can say positively that it was not the idea of trying to hunt a purchaser. The map shows the Coleman property and the Burgess and Reed tracts. The Reed tract is above the Hamby property about a mile from the Fowler property. The Reed tract is not the lowest tract on the river that we had an interest in; we had an interest in the Nelson and Hamby lands further down. I do not know how far this land is above Appalachia. I have never surveyed it. I do not know if McMullen took any options on land nearer than eight miles from the State line. We have no lands nearer than that now. At the time I came here in 1912, I knew nothing of my own knowledge about the Carolina-Tennessee Power Company.

At the time I came here in 1913 I knew, after McLelland made a survey and map, that the Carolina-Tennessee Power Company owned some land down the river. I knew they had deeds on record. I do not recollect that I examined the deeds. I could not swear as to that. I knew that the Carolina-Tennessee Power Company had deeds on record for lands further up the river than the Shoal Creek lands which we claimed. When we bought the land at the Shoal Creek dam site, I knew that the Carolina-Tennessee Power Company had lands just up the river above that dam.

site and knew that the dam site at Shoal Creek would overflow some
 of their lands. I did not know that the Carolina-Tennessee Power
 Company had as much as eighteen miles of river frontage on the
 Hiawassee River between the mouth of the Nottley River and the
 Appalachia dam site. I did not make an estimate of it. I knew
 they had some deeds. I knew that some of the deeds called for
 dam sites. I think perhaps I knew in a general way that some of
 the deeds called for a dam site at or near Beaverdam Creek. Pryor
 Nelson had told me about people owning lands along the river and
 I am not denying that he told me or that the Carolina-Tennessee
 River Power Company owned lands and had dam sites on the river,
 nor would I deny that he told me this prior to the time that I
 bought the property on the Hiawassee River. I expect he had told
 me every man on the river that had any claims; I think he
 195 did. I knew in a general way what land everybody claimed
 along the river or the land that they may own. I do not
 deny that Nelson told me about it. I knew that the Carolina-Ten-
 nessee Power Company had a number of contracts on record but
 I think they had run out. I knew they had a contract for the W.
 S. Roberts tract and that he had been paid \$2,000.00. We bought
 the Roberts land. I thought it was fair dealing to buy the land if
 the other man was not going to finish paying for it and Mr. Roberts
 wanted to make it, make the sale, if that other contract was not good.
 Mr. Roberts could be the judge of whether or not it was good. I
 do not mean to say that all of the people that we took contracts
 from and had any dealings with considered their contracts with the
 Carolina-Tennessee Power Company as options and said that they had
 expired. I do not say that all the people from whom we had bought
 had at one time given options to the Carolina-Tennessee Power
 Company. I looked up some of these options and those people
 wanted to sell the land and they came to us to buy them. I pre-
 sume that Mr. McMullen and Mr. Nelson went after them. I know
 some of them were called on by Mr. McMullen for he told me so;
 Mr. McMullen told me. I was not here to see them.
 I sent Mr. Nelson down the river to take options, to take a few
 options. Mr. Green is one of the people that had given an option
 and he had been to me several times. I do not think that I testified
 on the previous trial that I did not know about these contracts. My
 recollection is that I testified that I knew there were some old con-
 tracts. I first heard of Mr. Powellson in April, 1913. I cannot
 say when I first heard of him in connection with the Hiawassee
 River Power proposition, but probably along in the fall of 1913.
 That is a guess, I cannot answer it definitely. At the time the Hia-
 wassee River Power Company was organized on the 15th day
 196 of July, 1914, I did not know if the articles of incorporation
 had been received from the Secretary of State; I do not re-
 call of my own knowledge. The lawyers were organizing and look-
 ing after that. I could not say whether we had them or not. We
 met in the day-time for the purpose of organizing our Company,
 on the morning of July 15, 1914. That was the same day we
 brought the condemnation suit against the Fowler lands. I knew

that somebody was trying to buy the lands for a sheep ranch. I did not know who it was. I did not know that somebody was buying it but I knew that somebody was negotiating for it for a sheep ranch. We did not wait very long to take action to get it. I don't think that at that time we knew it was the Carolina-Tennessee Power Company. We understood it was a gentleman named Hickey trying to buy it for a sheep ranch. We were not instituting this suit to try to interfere with the Carolina-Tennessee Power Company. We were simply trying to protect our own dam sites; that was what we were trying to do. We were trying to protect them against anybody and everybody who was trying to come in and interfere against anybody and everybody. We did not consider that to be interfering with the Carolina-Tennessee Power Company. We considered that the things we were doing were showing up and we did not think we were interfering with them. P. E. Nelson was at the meeting of the stock-holders of July 15, 1914. I came to Murphy on July 14, 1914, on the afternoon train. The Fowler condemnation suit was brought on the 15th. We did not wait. We did that to protect our dam site. I presume we could have condemned it in Mr. Hickey's hands as well as anybody else's, but we thought it best to do it that way. The necessity for the haste was that we did not want to be interfered with. We did not know but what somebody was coming in to interfere with that dam site. I did not know that the Carolina-Tennessee Power Company was trying to buy that land; I did not know who was buying beyond Mr. Hickey. I had no idea who he was buying for or whether it might have been somebody out here in the country who was wanting it. We did not bring all the condemnation suits to keep the Carolina-Tennessee Power Company from acquiring this property. We brought five condemnation suits on July 15th because we wanted to protect the property. We could have condemned it at any time, but if some other small company had come in, then we could not. I did not know anything about Mr. Hickey communicating with Mr. Fowler until Mr. Nelson told me. I don't recollect that Mr. Nelson told me he was consulting with him. If I did I would tell you so. I did not try to make any contract after the organization of the Company with Mr. Fowler. I do not know whether or not anybody else did. I did not send anybody to deal with Mr. Fowler after the Company was organized unless it was Mr. Nelson. I do not recall if I sent him. I did not see Mr. Fowler myself. The little yellow strip around the Fowler land represents the contour lines condemned by the Hiawassee River Power Company. I do not recollect the height of the proposed contour line. The petition alleges that it is eighty feet. The Hayes land that we were trying to condemn was right across from the Fowler land. We proposed to condemn 120 feet within the contour line, of the Hayes land. We were not going to build a dam below that that would cover land on one side of the river 80 feet and on exactly the opposite side of the river 120 feet. We just took as little of the Fowler land as we could, because, taking up the profile, we found that at the upper end it took in the house and

garden, while on the north side there was no house or garden that would interfere with our taking what we wanted. When we began the condemnation proceedings we knew that the dam at Shoal Creek would be 115 feet high. We took an 80 foot contour at the lower end of the Fowler land. A 115 foot dam at Shoal Creek would have backed the water up to the Fowler land and given us some leeway on the Fowler land, but it took 20 feet on the Hayes land. We were simply advised that we would take as much as we wanted for our use and that it would not interfere with the house and garden. I swore to the petition in the Hayes case. In the Hayes case, in the petition I said we described the 120 foot contour line and the petition stated that that was necessary. It was necessary from one point of view for roadways. We wanted enough for the flood lines and to build roads. On the Hayes land there was no house to be interfered with. On the Fowler land, if we put the contour lines above 80 feet, it would go in his house. I did not survey the contour lines on either the Fowler land or the Hayes land. The contour lines were estimated from the profiles. The profiles had not been surveyed. Our petition in the Hayes condemnation suit stated that the plaintiff tried to purchase this land from Hayes. My recollection is that we tried to get it through West McDonald. I saw Mr. Hayes personally, but I do not recollect the date. I do not think it is necessary in trying to buy this land that I should go personally to see him. As to whether or not the statement in the petition that I had tried to purchase it as agent of the Power Company is true, but I do not recollect having seen him after the organization and I will look at legal papers very much closer hereafter. As to whether or not we made any efforts to purchase any of the property after the organization of our Company until we brought the condemnation suits, I would say that I delegated Mr. Nelson to go. I don't think I negotiated myself, but had made efforts before the time the suit was filed with all of these people. I think that makes a good deal of difference. The pieces in almost every one of these cases, Raper, Fowler and all of them, previous efforts had been made to buy them by me or my agent, but I did not see them between the filing and the organization of the company, but efforts had been made with all of them beforehand. I had deeds from Coleman, Burgess and Victoria James lands before the suit was brought. That embraced 1.08 miles of river frontage. At the time the suit was brought we had 13.4 miles under contracts of sale. I cannot tell you what part of our lands under contracts of sale is also covered by previous contracts in favor of the Carolina-Tennessee Power Company. The W. S. Roberts tract is one of them. I do not know that it should be deducted. That is a question of whose land it is. We had 3,100 feet of frontage on the Roberts land. I have already testified that when the suit was brought we had 11.61 miles under condemnation proceedings. That includes the Fowler land, with a mileage of 5.23. If that is deducted it leaves 6.38 miles. In the Green tract there is 2.20 miles. If that is deducted it leaves 4.18 miles under condemnation. I don't know what other land we had under condemnation that the

Carolina-Tennessee Power Company had contracts for. I think they had the Raper lands because I have a similar contract on the Raper land. I don't know about the Hamby land or the Martin lands. The Martin land has a frontage of one third of a mile; the W. B. Raper tract forty-six hundred and seventy-five feet; the Tom Raper tract, thirty-eight hundred and twenty-five feet. If all that is taken off, it leaves us not quite two miles. That is according to your addition, and according to that, it would leave us about 2.18 miles under condemnation. I signed the contract with the Sullivan Machinery Company. The place Turtletown, Tennessee, named in the contract, is about eight miles from our Shoal Creek dam site. When that contract was made, it was supposed that it would probably first come to Murphy and then go to the dam site. It is about three or four miles further by road, from Turtletown to the Coleman dam site. I was largely interested in trying to

200 get a paper mill here. I was largely interested in doing the work preliminary to getting it established. We expected some one else in with me. Mr. McMullen had an option from William Ramsey and wife for \$10,000.00, expiring March 1st, and from James Moore and wife for \$3,500.00, expiring March 1, 1913, and from W. E. Lovingood, for \$10,500.00, expiring March 1, 1913, and from Marion Hartness for \$400.00, expiring March 1, 1913, and from John James and wife for \$800.00, expiring at the same time. We did not pay any money until May, 1913. We paid John James later we bought the John James land recently. We had an option from L. C. Hamby and wife, expiring July 1, 1913. We did not take it up under that option. I don't think Lens Hamby owned any water power. We took that through Mr. Nelson. Mr. Nelson owned the water rights on the Lens Hamby land. We had an option from T. L. Johnson for \$5,500.00. We have not bought the land, we had an option from S. G. Mingus for \$800.00. We did not buy that. We wanted a part of it, and if possible we will buy it too. I had another option from S. G. Mingus, for \$500.00 for 30 acres; I did not take that up. It may be that we had another option from S. G. Mingus for \$750.00. We did not take that up if it was before May, 1913. I don't know if Mr. McMullen had a contract with W. M. Reece and wife or not; I assume that is correct, if you have the contract there. We have bought that land since. I do not recollect the contract price of that land. We have bought the Reece land since. There is a McMullen contract with Mr. J. M. Martin and wife, for a consideration of \$2,000.00. We did not pay that prior to April 1, 1913. The McMullen contract with James Danner and wife, payable May 1, 1913, was not paid. I do not know anything about the contract between McMullen and Phoebe Hickey, not by that name. I assume that was not taken up. I do not know why Mr. McMullen took options down on the State

201 line; when he was here we did not know where we were going to put the dam. I think Mr. McMullen turned over the options that he took on the various properties to Mr. Nelson. I think at the time Mr. McMullen was here I saw the options, but I did not have them. They were practically my options. He was

my agent. We have these options now. I said on yesterday that we did not condemn more than eighty feet perpendicular of the Fowler tract because there would be included a house and garden or something that we could not condemn. I do not understand that this would happen within the contour line of 120 feet on the Hayes tract. I have been on the Hayes land, but there was no dwelling on it, as I recollect, when I was there. I was on it in June, 1913. I could not tell you how high the water would be on the Hayes land without looking at the profile. We did not have the contour lines run out from the dam site over the Hayes property at the time the condemnation suit was brought. I do not remember now how much we had under condemnation proceedings for our dam at the Coleman dam site, nor do I remember how much we proposed to take of the J. M. Martin lands in that condemnation proceeding. I will say that we intended to take 175 feet above the bank of the Hiawassee river at the Coleman dam site. That is what we condemned. We did not intend to take that water level; that was land above the water level. The petition says the lands necessary, but it does not say that they are necessary for back water. We wanted the lands above there for roads, for egress and ingress to get in and out there. I do not see anything in the petition about desiring to condemn the lands for roads. I do not see anything in the petition except that we just wanted it for flooding; that is in section three of the petition. I can only answer your question by saying that 175 feet is the amount of land that was condemned. The additional land was taken for the purpose that I have told you, and the

202 reason that the 175 feet was put in there is simply to describe the boundary of the land. We were proposing to take the land 175 feet above the river. Mr. McMullen came here in the fall of 1912 and remained nearly all of the time. He took one or two trips back home. He was here up to July, 1913. I was not willing to buy these lands under the McMullen options at the prices named for them until I could tell what the lands were and what river frontage they had. I got the property map the last of June, 1913. I knew nothing of my own knowledge of the surveys and the dam locations of the Carolina-Tennessee Power Company when we began to purchase the property on the Hiawassee River, but I had heard of some. I had read a number of the deeds calling for the dam site at Appalachia. I did not know that there had been any fixed point for any dam. I am not certain if I ever read any deeds on record but I would not deny that I have. I looked at the record, but in a cursory way. I have said that I knew some of the deeds called for a dam site at Appalachia. I also knew that some of the deeds called for a dam site at or near Beaverdam Creek. I cannot say that the deeds called for a contour line 160 feet above the dam site at Appalachia. I guess they did. I should say I knew they did, except that I would not like to swear it in this way, for I could not say positively that I ever read a one, to be very particular. I think I knew that was in the deeds. I knew the deeds called for a contour line at or near Beaverdam Creek. I knew, when the contour line was called for, what

contour line meant. I did not understand whether it was the surface of the water from the level of the top of the dam or whether it was a line parallel with the surface of the water. I knew that the property line was one or the other. That is the same thing in effect, except as to the height of the dam. I do not recollect when I saw them, I was not here until the fall of 1912, except the trip that

I made with Mr. Chapman. I presumed it was sometime in 1913 when I saw them. I supposed it was in May or June.

203 1913. I do not think I read the records at that time. I heard of these things. The first time that I recollect reading the records was the time that we were buying the property in the fall of 1913. I did not read them good, but I do recollect reading one deed particularly; that was Mr. Nelson's deed, because it was a peculiar situation where he owned the water-rights and the land next to him had been sold, just the land, and he reserved the water-rights. Mr. Norvell told me in February, 1914, that he had been instructed to condemn for the Carolina-Tennessee Power Company our claims of interests on the Hiawassee River. I said on yesterday that the proposed paper mill project was in abeyance until we could get some power to build it. I do not recollect having stated we had a contract with somebody to furnish power to run the paper mill. We had an option on a contract for 10,000 horse-power; it was secondary power, enough to run a paper mill. On yesterday I said that we owned and had under contracts of purchase 2,234 acres. I do not know how many of these acres of land would be covered by water of our two dams. I have never had it surveyed out that way; if you mean how many acres of these acres would be covered by the water, I cannot tell you how many of these acres. I never had any estimates made of how many of these acres would be so covered. There is some of that land that is away from the river. I do not know how much of these tracts are covered by water and how much is above water and could not give you any estimate of how much would be covered by the water. The only land that we would want, except that which would be covered by the water from the dam, would be the land necessary for buildings, and you would have to have enough for your overflow of water and high water and enough to get in and out. When I went down the Hiawassee River in 1913

204 with Mr. McLelland, I saw our stakes of the McLelland survey. Mr. McLelland had put them there in the month of May or June. I saw no other stakes. I did not know E. W. Clarke & Company of Philadelphia at the beginning of this action. I did not work for E. W. Clarke & Company. I never did anything for them before the beginning of this action. I knew by common report that they were interested in the Tennessee Power Company. I had that information and belief. The Tennessee Power Company was furnishing power to the Knoxville Railway & Light Company, at the time this suit was brought. It had produced current sold to the Knoxville Railway & Light Company. I do not think that the Tennessee Power Company was the Company designated in the answer in this suit as the Water Power Trust. I do not know what is designated in that. The answer speaks for itself; I do not

know. I did not tell our counsel that the Tennessee Power Company was a Water Power Trust. I told them this; that is the only way I can answer your question, that Judge Dillard asked before the answer was drawn, right after this suit was filed, who the people were, who Mr. Powellson's people were, and I told him I understood it was Bretand, Griscomb & Company, and that I understood that Company was allied with the Electric Bond & Share people, and he spoke about having some friends over in eastern North Carolina or central North Carolina that had had difficulties with the Electric Bond & Share people. That is all the information that I gave him and that is all I know about it, and as far as the Water Power Trust is concerned, of my own knowledge I do not know that there is one. I tried to explain that at the last trial. I would like to make one more statement. I never saw the answer until about three or four days before this last trial and did not know that was in it. At the last trial I was asked if I repudiated this answer, and I answered: "No, I am probably responsible for it in a way, probably through gossip." That is just what I meant in that way, just what I have told you about Judge Dillard. I did not have Mr. Nelson swear to that answer or do anything; I was not there when he swore to that answer. I don't know when he swore to it. In the former trial I was asked if the Company referred to in my answer as the Water Power Trust was the Company selling electric current to Knoxville, and I said: "It is the one that is distributing electric current." That is my answer now. I suppose it is the one connected with this Company that they meant as the Water Power Trust. I did not undertake to say or connect Mr. Powellson with something that I did not know anything about. With reference to the answer calling Mr. Powellson a tool of anybody, I am only responsible for that in that I told Mr. Dillard that Bretand, Griscomb & Company was a director in the Electric Bond & Share Company, which is generally called in this country the "Daddy" of the water-power trust. Judge Dillard seemed to know something about the Bond & Share people and I am responsible for making these remarks to Judge Dillard, and beyond that, I do not know a thing about it. It would be a presumptuous sort of thing for me to criticize anything that Judge Dillard did, but as far as my part is concerned, I would have preferred that it would not have been in there, I do not like those things. I did not know nor did I have any connection with E. W. Clarke & Company prior to the beginning of this suit. I called on Mr. Powellson at the same time I went to see Mr. Ketcham in February. I know a man by the name of H. L. Milligan over in Tennessee. I do not remember if I took a letter of introduction from him to Mr. Powellson. That was in March, 1914. I just called to see Mr. Powellson at the same time that I called on Mr. Ketcham; I heard at that time that Mr. Powellson was interested. I had some conversation about Mr. Powellson in April, 1913, with Mr. George Townsend and Mr. Maxwell. I do not know whether Mr. Milligan gave me a letter of introduction to Mr. Powellson. Mr. Milligan is the Deputy Clerk over at Greenville under my brother, who is clerk.

On yesterday I testified about what took place at a meeting of the stock-holders of the Hiawassee River Power Company on July 1, 1914. I did not testify about that at the previous trial because I was not asked about it. I testified on yesterday that when this corporation was organized that I put money into it. I subscribed for \$98,000.00 worth of stock and Mr. Nelson subscribed for \$1,000.00 and Mr. Fain subscribed for \$1,000.00. I paid all the money. I did not pay for Mr. Fain's stock at that meeting. He paid for his stock in a check and I sent the money afterwards. I paid for Mr. Nelson's stock. My stock was not paid for in cash. In the resolution giving me \$98,000.00 worth of stock for my property, the maps, surveys, etc., if the minutes say that I did not vote on that proposition, I did not. I do not know whether Mr. Nelson had paid anything then or not. He was acting for me. Mr. Fain had an interest at that time; he paid his thousand. There was a verbal agreement to the effect that I would pay Mr. Fain back his thousand dollars. A verbal agreement is good with me as any kind. I had put about \$40,000.00 into the water proposition at that time, but the lumber cruising was included in this except that in the cost of the Chapman reports. The timber cruising did not go into it. I subscribed \$98,000.00 of stock for what I paid out. I do not call the expenditure water. The proposition is worth something and there may be some water if you want to call it that. There has been paid on the land \$17,348.34. The balance of \$60,000.00 that was paid was money that had been paid for reports and engineering and cruising and attorney's fees, etc. I do not know whether Mr. Nelson or any other party, between the organization of our Company on the 15th of July, 1914, and the filing of the condemnation suits against 207 Fowler, Hayes, Raper, Martin and Johnson, approached either of these men and endeavored to purchase their properties for the Power Company before the suits were brought. I did not.

Redirect examination:

In my statement of what had been expended on our proposition I included nothing for my services. I do not remember being asked anything at the last trial of this case about the stock-holders assembling at the last meeting to the location of the dams. I was not asked about it. That question did not arise.

Defendant offered in evidence the deposition of J. P. McMullen marked Defendant's Exhibit No. 42.

In the deposition Mr. J. P. McMULLEN testified as follows:

My name is J. P. McMullen. I am 66 years old and live at Knoxville, Tenn. I have known Mr. Hugh Vandeventer for years. I was in the County of Cherokee, North Carolina, about eight months in 1912 and 1913. I had connection with Mr. Hugh Vandeventer in acquiring or attempting to acquire property lands and water-rights along the Hiawassee River between Murphy and the line between

the State of North Carolina and Tennessee in Cherokee County, North Carolina. I talked to different property owners on the river and did all I could to acquire options on the different properties. I endeavored to take those options for the water power. I endeavored to secure water-rights as well as land. I took quite a number of options. I do not recall any of them now. They were taken in my name. The options covered properties fronting on the Hiawassee River. I don't know whether you would call it fronting or not but in the Hiawassee River principally. I took a number of options through Mr. Nelson. He was acting for me. I employed him to look after and secure the options for me. I do not know the exact date.

It was in 1912. In the fall of 1912 and the early part of 1913 he was still acting for me. I was sent there by Mr. H. F. Vandeventer. He employed me to go down there and

secure these options for him. I talked with a number of land owners, through Mr. Nelson talked with quite a number that I did not. I think I was in Murphy from December, 1912, until the fall of 1913. When I was in Cherokee County doing this work I knew from hearsay that there was such a Company as the Carolina-Tennessee Power Company. I knew they had an office there in Murphy. I don't know whether the Carolina-Tennessee Power Company was doing anything towards buying lands or condemning property or in any way active at the time I was in Cherokee County. I saw I knew of nothing they were doing while I was there. As to whether or not I was acquainted at any time with the officers or agents of the Carolina-Tennessee Power Company, I was acquainted with Mr. Norvell and Mr. Smith a part of the time I was there. Mr. Smith was not there when I went and did not come for sometime to Murphy. Neither Mr. Norvell nor Mr. Smith ever mentioned the water power on the Hiawassee River the whole time I was there. Neither of them warned me that I was interfering with their rights or told me to keep away. The Carolina-Tennessee Power Company was doing nothing that I ever knew, during the time that I remained in Cherokee County, with reference to acquiring property and water rights along the Hiawassee River. I employed an attorney, Mr. J. D. Malonee soon after I went to Murphy and advised with him as long as I was there. I requested him to see if he could find a map of the Carolina-Tennessee Power Company's property. I am acquainted with Mr. A. A. Fain; he was clerk of the court at Murphy. I called his office to see if there was a Carolina-Tennessee Power Company map on file and asked Mr. Fain about the map and he said there was no map there and never had been. That was, I should say, in December, 1912, something like that.

Cross-examination:

I do not recall the exact date that I went to Cherokee County on this business. You see, this has been several years, about four years. I went in the summer of 1912, when I first went there, I remained about a month and returned to Cherokee in August. Now, those are just my recollections. I know I was in the hospital here on August 25th, for that was my birthday, and I recall that positively.

I next went back to Murphy in the fall of 1912, I should say in October, and remained about eight months. I never exercised any of the options that I took; I transferred the options. As to why I was looking for a map of the property of the Carolina-Tennessee Power Company, I will say that in taking these options, I heard there was some property there that they had options on or had bought, and I wanted to find out what properties they had along there and I undertook to find a map of it. I examined the office of the Register of Deeds to see if the Carolina-Tennessee Power Company had filed deeds for this property along the route. I found quite a number of papers on record that I took to be options, and I don't know anything different yet. I did not find a large number of absolute deeds or conveyance of the Carolina-Tennessee Power Company. I was told there was a few. I couldn't say a large number of property deeds because I did not see them. I examined some of the deeds. I think Mr. Nelson probably told me that the Carolina-Tennessee Power Company had taken about a dozen deeds. That would be as many as he mentioned to me. I found quite a number of options on the records of Cherokee County to the Carolina-Tennessee Power Company. I took options on some of the same properties that had previously been optioned to the same Company; one or two payments had been made on these options. No, sir, I had not been told that the Carolina-Tennessee Power Company had filed a map of its location on the Hiawassee River. I knew Mr. Smith and Mr. Norvell. Both were officers of the Carolina-Tennessee Power Company. I did not go to either of them and ask what property the Carolina-Tennessee Power Company had on the Hiawassee River nor to show me a map of this Company's location.

Redirect examination:

As to the options I found recorded in the Register's office of Cherokee County, these options, according to my judgment, had by their terms expired.

The witness McMullen in his deposition, was asked the following questions:

"Q. State whether or not you ever requested your attorney, Mr. Maloney, to see if he could find a map of the Carolina-Tennessee Company's property?

A. I did, would be my answer."

"Q. State what, if any, report he made to you?

A. He reported that he could find no map of theirs on file."

To this question and answer the plaintiff objected on the ground that the attorney's report was hearsay.

This objection was sustained and the defendant excepted, and assigned this exception as Defendant's Exception No. 9.

The witness was asked this question:

"Q. State whether or not the parties from whom you took the options alleged to have been covered by deeds or options to

Carolina-Tennessee Power Company did not tell you that default had been made in the payments according to the terms of the options?

A. You mean these options that I took?"

"Q. Yes, the option that you took?

A. In every instance they told me that. I did not take them unless they did so."

"Q. State whether the parties from whom you took options alleged to have been covered by options to the Carolina-Tennessee Power Company told you that the options had expired or run out?

A. They did."

To this question and answer the plaintiff objected and the objection was sustained.

The defendant excepted and assigned this as Defendant's Exception No. 10.

T. C. MULLENS, sworn for defendant, testified as follows:

At the present time I live at Booneville, Ind., and am mining coal. I am a civil engineer and studied civil engineering at the State University of Arkansas, where I graduated in 1909. In 1913 I was working for Mr. C. A. Chapman, of Chicago. I was sent by Mr. Chapman to make an investigation of the water power on the Hiawassee River. I was down here about five weeks and had eight men most of the time in my field party. My field party consisted of a transit party and a level party. We ran levels down the Hiawassee River and back up the principal streams to such a point as I figured the water would back up; then we ran such transit and base lines as were necessary to take the general course of the river, and we cross-sectioned a number of prospective dam sites all the way through as far as Appalachia, Tenn., from Murphy. We ran a base line and took levels and made cross-sections. Then we made such cross-sections of the river and the principal streams tributary to the river as, in my judgment, was necessary to determine the basis covered by the dam; at these places where we took cross-sections, we established points on stakes on each side of the river and on either side of the stream, such points being at an elevation sufficiently high to take in the water line backed up from the proposed dam, I may say any proposed dam down the river, because it was high enough, that is high enough above the water that if the water was backed up to Nottley River, it would come around the side of the hill there. We investigated the entire river as far as the location of dam sites was concerned. We investigated the Coleman and Shoal Creek dam sites. This blue print is a map showing the profile of the river from above Murphy to Appalachia, Tennessee. The profile of the river is simply a line that shows the general fall of the river from Murphy through to Appalachia. The object is to determine the fall of the river and determine how high the dam can be built at any given location. That is the object of making the profile. In making the profile, we simply run a line of levels taking the elevation every one or two hundred feet and platted the lines. This map is a small profile of the Nottley River. The Nottley River is one of

the tributaries of the Hiawassee River. The same thing was done on the Nottley River. This map is a cross-section of the Hiawassee River at the Shoal Creek dam site. In explanation of what a cross-section is, I will say,—suppose you want to cross-section the stream, you cut it down here, then looking at that side of the river the same way of the river if you are looking at a line that cuts the river at right angles, you have the cross-section of the stream. The object of taking the cross-section is to determine the slope of the banks on both sides of the river to tell how wide the dam would have to be at the top and at the bottom and give the different elevations on the sides so as to determine the material required for the dam. This cross-section is of the Shoal Creek dam site. If you build a dam 200 feet, it would be 903 feet across the top. This map is a cross-section of the Hiawassee River at the Coleman dam site and illustrates the same principle. These are separate plans of the river at these

213 particular points and they are a drawing of the river. This is a topographical plan. It shows the course of the river; these two lines here represented the river, the direction is flowing down this way. It also shows the contour line running parallel with the river. These contour lines are located by an instrument from the bank of the river or center of the river on either side so that you can determine in building a dam on these particular places just how the ground at that particular location is. I have made one of these profiles that applies to the Shoal Creek dam site and one to the Coleman Creek dam site. In addition to the cross-sections taken of Coleman Creek and Shoal Creek dam sites, I took these cross-sections wherever I thought it was necessary to take them. I set contour stakes at points where I took the cross-sections. In going down the bank of the river we took these cross-sections at various places. Wherever there was a break in the bank of the river we cross-sectioned it. If it ran straight for a quarter of a mile either way, we took the cross-section at the end of the quarter of a mile; wherever the break in the bank was prominent or a little out of the ordinary, we took a cross-section and established stakes upon what we called the contour line, put them on the line where the water would be if you build the dam at a certain height at a certain point, it would go around these particular lines. We put down stakes at all points where we took cross-sections. I had nothing to do with the lumber investigations that Mr. Chapman made for Mr. Vandeventer. I only examined the water power on the Hiawassee River. We commenced work the latter part of January and completed it the latter part of February, 1913. In considering the water power, we consider the discharge of the river at Coleman and Shoal Creek dam sites. We took it from the Government reports. We wanted the discharge of the

214 river at these two dam sites to compute the available water power at these sites. My estimate of the water power at the Coleman dam site was somewhere from fifteen to twenty thousand horse power. The report of Mr. Chapman on the water power proposition was based on reports that I had made to him. I was the man that did the actual work. My recollection of the average minimum horse power reported by me at Coleman dam site was somewhere

around fifteen thousand horse power and at Shoal Creek dam site somewhere close to thirty thousand horse power; I mean by that, primary power, twenty-four hour power. I considered the available height of the dams at Coleman and Shoal Creek dam sites. I made report on that to Mr. Chapman. I estimated the drainage area in the Coleman dam site at a little over 900 square miles, and at Shoal Creek a little less than a thousand square miles. The drainage area is the area of land that drains into any particular stream in question. In fixing contour lines, I placed stakes where I made cross-sections; I did not run a transit line around it. At the time I was working I had all the Government maps I could get and all the Government reports. Relative to connecting up one contour stake with another contour stake in reference to these Government maps, I platted my cross-sections on the map and connected between the two points where the cross-sections were taken. That was not as accurate as running with a transit line. I made an estimate as to the amount of monthly flow of the Hiawassee River at the Coleman and Shoal Creek dam sites. That was in order to determine the water available, in order to estimate the water power that can be developed. These pictures are hydrographs. They show the flow of the stream during certain period of time. I made the hydrograph. It was made up from the Government report over a period of twenty years. That estimate made by me was based on the reports issued by the Government. The hydrograph shows the month for each year from 1899 to 1912. It shows the cubic feet per second for each month during the year and the same for each consecutive year after that. It shows the number of cubic feet of water passing given point per second during a month at Coleman dam site and at Shoal Creek dam site. The other hydrograph shows the same thing for Shoal Creek dam site. The purpose of this hydrograph was to determine the flow of the stream on an average over a certain period of time, which would give us the continuous horse power that we could develop.

Cross-examination:

After I left college, I went to the railroad company, and then later on with Mr. Chapman. In 1913 I was 28 years old. I was sent here by Mr. Chapman in January, 1913, and remained for five weeks. I made some examinations of the Hiawassee River from Murphy to the State line, a distance of 26 miles or more. Relative to making estimates of dam sites from Murphy all the way to the State line, we surveyed the field necessary for doing the work after we got back in the office. I would not call our work a preliminary examination. We made about thirty cross-sections of the river from Murphy to the State line. We made them at particular places where the valley might widen or narrow. After the work was all over we determined on three dam sites. All of the cross-sections that we made were not for dam sites. I should say that four or five locations looked prospective. At the particular time that I went down the river I was making these cross-sections for the purpose of ascer-

taining later whether or not they were available as dam sites. Four or five of them were available. The others were made for the purpose of determining the width of the valley. We did survey our contour lines for dam sites, but not the water line. I did not

216 survey out contour lines where the water would run for any particular dam site up the river with a transit. You run a contour line with a level; we ran it with a level at particular points. We did not run the line around the hill with a level, but we established points at various locations along the river where this water line would come. We made cross-sections and where we made cross-sections we put up contour stakes. In some places the stakes were more and in some places less than a mile apart. They did not go through to the State line. They went down about Shoal Creek. The cross-sections were about two-thirds of a mile apart. The contour stakes were in some places a mile apart and in some places a half a mile apart. I did not make any contour line on each boundary of land as we went up and down the river. I had nothing to do with the land. This river in some places widens out and in some places it is in gorges. I did not blaze out any path or growth or anything between these contour stakes. It is a matter of fact that we put up contour stakes on both sides of the river, everywhere that we took a cross-section. That was all that was done in the way of establishing contour lines. The contour stakes were put up at a height of 1500 feet contour lines as shown on our map and by our survey and by the Government survey at an elevation of 1500 feet. The height of the stakes above the water level varies according to the location down the stream. We determined where we were going to put the contour stakes in making the preliminary survey by using the established water line at an elevation of about 1500 feet. Immediately above the Coleman dam site the first contour stake was about 150 feet high above the flow of the river. On the trip that I made here I never ran out any contour lines or made any contour lines on any map, only the ones on the map before me. We ran our contour lines on all the important creeks. We ran the levels back up the Persimmon Creek as far as the 1500 foot contour line.

217 I do not remember how many cross-sections we made of that creek, but we made as many as five or six. We only put up stakes at the point where we made cross-sections. Our object in making the cross-sections was to determine the width of the valley. We were trying to get the width of the valley at the top and the bottom and establish the lines. We put memorandum on the stakes. We never put a stake out without marking it. I do not remember what people were living down on this river when we put up the stakes. I do not think I can name any in Cherokee County that saw me put up any stakes. The people that were with me, I have their pay-roll in Chicago; I haven't it with me. I personally did not put up any stakes. I am absolutely sure that I saw employees driving stakes. I would say that I actually saw about 100 put up. That is just a guess because I do not remember. I cannot at this time name any man that put them up or give the name of one employee that put them up. In going up and down the river I did not see any stake

that had theretofore been put up, nor any bench marks except the Government bench mark. I did not see the Government put them up, but they are shown on the Government report. I do not remember the exact size of the stakes that were put up by me; I believe they were about two feet long, one and a half inches by an inch; that is what we usually use. These maps here are cross-sections of certain dam sites. The blue prints bear the date when they were made. They show they were made in March, 1913, as I recollect. That was when the original tracing was made. I was not building the dams nor locating the dam sites; I was only reporting on the available places. I did not think I should make cross-sections of the other dam sites. I made tracing of four or five dam sites. I do not know if blue prints were made of all of them. When I was here in January or February of 1913 I made a survey from which the flooded area could be calculated in acres. I have explained just what I did in reference to the contour lines, in regard to establishing the points and locating these points on the sides of the banks. I did not run out the lines. I did not make any survey so you could establish the contour line on any particular man's land, because I had nothing to do with the land. I do not know just how the property lies down the river. When the contour lines are accurately run out, the calculation can be made of the acreage inside the contour lines. There are no contour lines on the McCalland map. A calculation could be made showing what lands would be flooded under the contour lines of the dam site that we located. This could not be done without any contour line. If you have four or five dam sites in mind, you would necessarily have to have four or five contour lines, one for each basin. In order to show where the contour line would be for any particular dam site that we located, you could interpolate between the point you set on top of the hill and the point down at the river for any elevation you wanted, and if a property owner wants to determine where the contour line is, all he has to do is go to my bench mark and run the contour line out on that particular property. They could do that at any time they wanted to. If they wanted to take up a particular piece of property and find where the contour line runs they could make a calculation accurately of the contour lines on the survey that was made. From the established base line, you would have to run it out for this particular piece of property. The stakes that we put up for the contour line was not put up to represent the four dam sites. It was put up to represent the 1500 foot elevation. The contour lines were not put up for any particular dam site. They were put up from the Government data from the Louisville & Nashville Railroad over on Nottley River to the town of Murphy. We selected a point at which, if we built the dam, we could back the water without doing any damage and that is the line we established. I had before me some maps and data from the Government, but I did not make my report based upon the Government data, but upon my own knowledge of the river. I did not make any examination of the flow of the river; that was based entirely on the data from the Government. I understand there is no Government

station between Murphy and the State line. We obtained the flow of the river at Coleman by prorating the area drained into the Hiawassee River at these particular points. That is not guess work. The Government had an accurate survey of this entire country, from which you can determine the amount of surface that drains into the Hiawassee River. You get the amount that drains into the river and then the amount that drains between Murphy and the Coleman dam site and apportion that to get the flow at these particular places. The Government reports does not show the number of cubic feet per second of water that flow over the Coleman dam site. The only way to get that was to take the figures at another point. That is the only way that any engineer could get it. He could measure it, but it would be foolish to take one measurement one month and count that as the flow of the river. He has to take the records as far back as the record has come.

Redirect-examination :

In my investigation I was investigating the water powers of the river. The contour stakes were set relative to the water powers found on the river. The stakes that were set could have been used afterwards relative to the Coleman and Shoal Creek dam sites.

J. R. McLELLAND, sworn for defendant, testified as follows:

220 I am a civil engineer. I made this map of the Hiawassee River from near the mouth of Valley River to the mouth of Shoal Creek in June 1913. That is the property map; it shows the river from the point and between the points that I have described and the property abutting on the river, on both sides. We did preliminary work on that map in about two weeks. I did not run the property line. I tied up the corners as we passed up the river. We ran a preliminary line up the north side of the Hiawassee River and whenever we passed a land corner we took the station on our line and the distance from it to that corner. By land corners I mean the corner of some man's land. The corners of the different owners were pointed out to me. That is the way we got the map of the property. That map also shows the course of the river. We took the course of the river right on the banks all the way up. The course of the river shown on the map is correct. When I made that map I did not actually survey the property lines. I surveyed them afterwards. They showed up right according as shown on that map in the Register of Deeds' office. That map is correct as to the directions and dimensions as compared with the descriptions that we obtained from the Register of Deeds' office. This is a blue print of my original tracing. I put these dam sites on this map, the Shoal Creek dam sites and the Coleman dam sites. This map was made in reference to the land between these two dam sites. And back up towards Murphy from the Coleman dam site.

The defendant here introduced the original map of the Hiawassee River from Shoal Creek to Murphy, which is the map that Mr.

McLelland identified as the one made by him, as Defendant's Exhibit No. 43, a copy of which is attached.

The witness McLelland continued to testify:

I did this work for Mr. Vandeventer. He paid me \$100.00 a month and expenses. I was at this work just a month.

Cross-examination:

I did not run out the property lines at right angles with the river. The lines are correctly laid down from the descriptions in the Register of Deeds' office.

The corner of the tract was just pointed out to me on the river. I laid down the lines between the property owners. I did not survey all the way from Murphy to the State line. We started at Shoal Creek and came to Murphy.

The defendant here introduces, as Defendant's Exhibit No. 44, the blue prints identified by the witness Mullens.

CHARLES O. LENZ, sworn for the defendant, testified as follows:

My name is Charles O. Lenz. I live in Newark, New Jersey, with offices at 120 Broadway, New York. I am a mechanical and electrical engineer, with 27 years' experience. While I was with the Sanderson & Porter Company, we built the Mishawauka Development Company in Indiana; that was a water power development; and at Spokane, Washington, we built the Inland Empire Railway, and I have built since that myself the Talulah Falls development over here in Georgia. At the present time I am engaged as consulting engineer for the Southern Power Company with head office at Charlotte. I was engaged by Mr. Vandeventer to investigate the water power of the Hiawassee River about 1914. Relative to the geography of this section, I got my data from the Government Geographical Department for the field work, and from the Geological Department for the water supply. We used two gauging stations, one at Murphy and the other at Reliance, Tenn. They are gauging stations put in by the Government for the purpose of measuring the stream flow at the station — is located. It was necessary to know the stream flow at certain gauging stations in order to prorate the flow of the stream from that station to the point that you located. This is a copy of my report that I made to Mr. Vandeventer, dated June 20, 1914. I considered the flow of the river in estimating the water power of the river at two stations, one at Murphy and the other Government station located at Reliance, Tenn. Relative to the drainage area, I looked up the Government data which shows the Government area at Murphy and Reliance which was published by the Government. The power is determined from the gauging stations. The factors of power is the run-off of the stream, the amount of run-off that the stream produces, and taken into a consideration the amount of head you create, you get the amount of water supply that you will have. Run-off is the water which runs on in the flow of the stream, the water which runs into the river.

The two dam sites at which I estimated the power available were called the Shoal Creek and Coleman dam sites. They were the dam sites that I was informed were the ones that were under consideration by Mr. Vandeventer. In explaining the calculation that I made by which I was to determine the questions at the Shoal Creek and Coleman dam sites, I first took the flow records at Reliance for the term of years, and the one at Murphy, North Carolina, and sketched a hydrograph from that information. I platted a hydrograph from the Reliance station and one at Murphy and prorated between the two and got the prorated power. That would give you the prorated water power at the two dam sites, at Shoal Creek and Coleman dam sites. The information used relative to the rain-fall in this section was that published by the United States Weather Bureau Department of Agriculture. Several years were used as the averages. I took

particular information relative to the rain-fall at these two points for the reason that I was very familiar with the rain-fall and run-off on the other side of the mountain, because I made a persistent study of it over there, and I wanted to get the difference in run-off as against the amount of rain-fall of this section of the country just over the mountain. Rain-fall is the amount of the precipitous rain that falls on any given area, and run-off is the difference between the rain-fall and the absorption, evaporation, etc.

In other words, some of the rain that falls does not go into the stream. The average annual rain-fall at Murphy is about 59 inches. That is an unusually good precipitation, the average around the country being somewhere about 40 inches. Precipitation means that if the rain-falls were measured in a given area, it would be 59 inches higher at Murphy. In connection with my estimate of the water power proposition, I made certain hydrographs. A hydrograph is the waterflow picture. In my report is a hydrograph. The hydrograph or water picture, as it may be called, consists of taking these flows of the river which are presented here in the diagram, and plating the rates as they are given from the Government hydrograph. These originals are platted and that shows practically a water picture of the flow month by month throughout the year, and it gives the information at these particular stations from 1897 to 1913. It shows the amount of water that is discharged on an average month throughout the year. It is just the picture that shows the discharge of the river at these particular periods of time. The period of years used of the gauging at Murphy in estimating this hydrograph were from 1897 until 1913. We derived the mean monthly flow of the river at Coleman dam site and Shoal Creek dam site and the storage created by dams erected in each case, at the two dam sites.

In computing the available power for the Shoal Creek and Coleman developments, they were prorated from Murphy, North Carolina, and Reliance, Tennessee, gauging stations. They were used as a basis for making our computations. This data was taken from the Government data. In considering the developments at Shoal Creek and Coleman dam sites, I did consider the Shoal Creek development both with and without the storage at Coleman dam site. I mean by this that back of each of these dams there are impounding

reservoirs and that the capable contents of these reservoirs permit one to draw water over and above the stream flow and then to reinstate it at other periods of time. In other words, the purpose of impounding the reservoir is that you can equalize the flow by the amount of the water that comes in and can be drawn off. I mean if you have a dam at Shoal Creek there would be a reservoir back of that at Coleman dam. You could store the power at the Coleman dam and then use it at the Shoal dam for a certain period. I have co-ordinated the two dam sites. This is my estimate of the Shoal Creek development without connection with the development at the Coleman dam site. The drainage area at the Shoal Creek development alone would be 972 square miles. The drainage area is the water that is drained from the territory back of that development. We reached the result that the drainage area would be 972 square miles from the drainage area as given at Murphy and Reliance and platted it from the topographical sheets of the Government reports and equalized it between the two points. That is as accurate as one can get it without running final contours and final surveys. I figured the average minimum equalized flow as calculated from Murphy, North Carolina; to Reliance, Tennessee, gauging stations; on Shoal Creek I figured this to be 700 second feet. That is 700 cubic feet of water flowing per second. We figured relative to the additional flow there that is the equalized flow including the impounding back of it and resultant thereto. My hydrograph shows the maximum flow or discharge for these years. I figured it at 68,000 second feet. I figured the estimated capacity of the reservoir for the Shoal Creek development at about 11,475 acre feet. An acre foot means an acre 1 foot deep. My estimate of the capacity of the reservoir was five hundred million cubic feet. The reservoir has much more water in it than that, but that is the amount available. As to the twenty-four hour continuous horse power at the Shoal Creek development, I figured the shaft horse power would be 7500 horse power maximum. I figured the secondary twenty-four hour continuous power there for eight months during the year at 5,250 horse power, 4,725 shaft horse power. This estimate is relative to the Shoal Creek development without any Coleman storage in it. My estimate of the total primary and secondary horse power is 15,800 horse power. I figured this horse power at Shoal Creek on a ten hour continuous basis and on a twenty-four hour continued basis. I also considered the development on Shoal Creek in connection with the Coleman storage. This estimate does not change the drainage area. I figured the Shoal Creek development with the Coleman storage for the lowest three years. I figured relative to the Shoal Creek development with the Coleman storage on a twenty-four hour continuous power basis, and on a ten hour basis. In explanation of how you can use the Shoal Creek development in connection with the Coleman storage, I will say that it is possible where one has a storage reservoir back of a development each in a given place where the water can be co-ordinated, that both reservoirs can be used. At times you would use the water back at the Coleman dam, let it come through to furnish additional power down at the Shoal Creek reser-

voir. The plan in using them in co-ordination was to create the power of the two whenever necessary. I estimated these same things in relation to the Coleman development alone. The drainage area in the Coleman development was 915 square miles. I figured the Coleman development for the lowest three years. I mean that that is the average of the three lowest years according to the Government records that we have. I figured the Coleman development for twenty-four hour continuous power and for ten hours, and in connection with the three average years I figured the continuous power for these average years. In making my calculations I had all of the data supplied by Mr. Chapman and all the Government data available and the record of the contour lines, rain-fall records, and the hydrograph work of the Government in connection with it. That was all the data that was necessary to enable me to make my calculations. I considered the location of the Shoal Creek development. The dam site was shown on the McLelland map. I considered the height of a dam to be built at these reservoirs, and concluded that the dams to be built should be gravity cyclopean dams. That is a dam which has displacement stones made in concrete so as to give weight to the dam. I know Mr. B. H. Hardaway of Columbus, Georgia. He is a contractor that has built most of the important dams in the south. He examined the Coleman and Shoal Creek dam sites. In connection with this development, I considered a power house. I figured on a steel frame power house with brick curtained walls, 80 by 150 feet. I figured the power apparatus equipment necessary. I figured on four 5200 horse power spiral case wheels, at Shoal Creek. I figured the cost of the Shoal Creek plant at \$1,609,000.00, and the Shoal Creek plant, with the additional equipment and additional horse power necessary to utilize the Coleman storage, at \$1,898,000.00. I figured the cost of the Coleman plant at \$2,185,000.00. This estimate I based upon a completed plant at each of these places. I also considered the question of building transmission lines in connection with this development and made a close investigation of the market in this territory. I estimated the detailed cost per mile for a steel pole transmission line to convey the power at \$3,143.00 per mile, and that the construction of this line would cost \$352,000.00. I was furnished a map which purported to be a survey for a railroad to these plants. I figured on a railroad being eight and a half miles long, without the rails that we expected to get. My estimate of the cost was \$42,000.00. My total estimate of the Shoal Creek development was \$2,534,000.00. In making these estimates I considered the market for the power in the country. I made a personal investigation of the different commercial power markets in this territory in Georgia and in Tennessee. I investigated the Tennessee Copper Company, the Ducktown Copper Company and the other industries located in Georgia. I went to these places personally and made an analysis of the power to be required at the different places, all of which is set forth in detail in the report. I figured the power that would be necessary to furnish to the town of Murphy; that was 150 horse power. Based on my experience as an engineer, I would say that I would consider that

dam could not be safely built without investigations as to the foundations of the dam by core-drilling.

Cross-examination :

In my opinion it is necessary to have some core-drilling done before the construction of a dam. At the time I made my report I did not know there had been any core-drilling done at Shoal Creek. It was necessary to have that information before you could determine anything about the construction of a dam. Civil engineers and hydraulic engineers differ about having core-drilling done. In my opinion, a man who thinks that coredrilling is not necessary is not right. He may think so, but he cannot prove it. In my report to Mr. Vandeventer, I did not say anything about core-drilling. I made numerous calculations about the capacity and horse power of these dams. They were made principally from the records of the United States Government. I did not do any surveying here in April, 1914. I never surveyed the basins of either dam site or the lands under the contour lines. My work was principally calculations, based upon data made by the Government up to the time of my report. These calculations could have been made in my office in New York as well as by coming to Murphy. The calculations were all made in my office. I was not down on the river in Cherokee County but one or two days. I think I came here about April 6, 1914. I did not go down the river. Mr. Hardaway and I went down about two years ago. It was before the last trial, yes sir. I know that I was not down on the river until two years ago; I cannot answer your question as to whether or not it was before this suit was brought. I went down on the river about a month before the trial of the case two years ago. I was not down on the river before I made my report. My report is dated June 20, 1914. At the time I made these calculations the maps had contour lines on them. I had the Government contour maps. These contour lines are 1500 feet above sea level. Relative to the maps of Mr. Vandeventer that I had, I had the location contour lines at the dam site and I had the drainage area. I had one blue print of the contour line 1500 feet. Mr. Vandeventer once figured the dam site at Persimmon Creek. I do not know how many dam sites he figured on. This dam site is Persimmon Creek and these contour lines on this map are based on the dam site there. I did not have any maps or blue prints before me of Mr. Vandeventer's showing contour lines of the two basins for the two dams to be erected, one at Shoal Creek and one at Coleman dam site. That is not necessary in order to figure the storage capacity of the dam, to have a map showing the contour line. I did have contours. I had the Government information. The Government contour line is 1500 feet above sea-level. The Government contours are sometimes 100 feet and sometimes 50 feet apart. One is 1500 feet, one at 1400 and one at 1600. I think the level or elevation of the base of the Shoal Creek dam site is somewhere about 1227 or 1230 feet. The tops of the dam proposed to be built was 115 feet above the water. That would make the crest of the dam above sea-

level about 1345 or 1350 feet. The elevation of the Coleman dam at the bottom of the dam above sea-level would be about 1345 or 1350 feet. The height of the dam proposed to be erected at Coleman would be about 150 feet. That would make the crest of the dam 1506 or 1507 feet. It was necessary to acquire land for that development to a level of 1517 feet at the upper end. The number of acres necessary to be acquired for the development of the lower dam site at Shoal Creek would be about 11,000 acre feet. The contour lines represent the boundary lines of the storage reservoir. They represent what is called the welded perimeter. If the contour lines had not been accurately established for these reservoirs, there could be an inaccurate calculation of the capacity of the reservoir. We get them very close to all intents and purposes, as close as is necessary for it. What difference does it make whether there is a few more acre feet or a few less?

Redirect examination:

For the storage basin at Coleman dam site we would have to have 4,000 acres of land, and at Shoal Creek 1,100 acres of land.

GEORGE FITZGIBBONS, sworn for defendant, testified as follows:

My name is George Fitzgibbon. I live in Milwaukee, Wisconsin. I am a Diamond Drill operator. I am with the Sullivan Machine Company. I was sent here by them to drill the dam site at Shoal Creek and Coleman. I arrived in Knoxville on August 2, 1914. I reached Murphy on August 5, 1914. The first core was taken out on Shoal Creek on August 19, 1914. The Diamond Drill we had is connected with a gasoline engine. The diamond drill is a rod with a diamond bit on it. It is used to drill rock. We drilled some cores at Shoal Creek prior to August 21, 1914. These papers are daily reports of the work that we did there on August 19, 20 and 21. On the 19th we set the machine up and started the diamond bits in. We took out two feet and eleven inches of core, rock core on that day. On August 20th we drilled ten feet and seven inches. That is the amount of core that we took out. We got that core from the diamond bit. The diamond bit had cut it in the rock on the shore. Prior to August 21, 1914, we had not done any drilling in the river bed itself; we had dug trenches in the side of the river down through the formations there. I arrived at Shoal Creek on August 6, and started a corps of men digging a ditch on the south side of the river while we were waiting for the machine, and our machine did not arrive at Turtletown until the 14th of August. That is the nearest railroad station. From the 6th of August we proceeded to dig a trench on the south side of the river for uncovering the rock in order to investigate and examine the rock at that side of the river. It was necessary to do certain drilling on the side of the river because we could not see the rock. It was covered by ten feet of ground. Prior to August 21st we did not dig any trench on the north side of the river. We did this drilling to test the bed-rock of the dam site and get the tightness of the rock of the dam site. The instructions

that I received before coming here were to drill the hole 100 feet deep to see if the rock was a solid formation. I mean the hole on the south side of the river. My instructions were to drill any holes that we thought necessary to test the formation on the river-bed. Our instructions included the bank of the river and drilling both dam sites. Here is a box of the cores. This rock is what we took out with the core drill prior to August the 21st. The core drill cuts down and brings it up. It rotates around it, revolves around it and cuts it out of the rock. That is the core so you can determine the character of the rock. I have had twenty-eight or thirty years' experience in core-drilling. It is usually done for prospecting and testing dam sites, in order to discover what the nature of the rocks is and the tightness of the rock at the foundation of the proposed dams.

Cross-examination:

It is not exactly usual to use the core drill in order to determine where to put the dam sites. The drilling is for the purpose of enabling you to find the nature of the rock. You decide to construct the dam at a certain site before you core-drill it, and in drilling the rock you find the nature of it. We did drilling in the bed of the stream, but not before August 21, 1914.

Mr. McLELLAND, witness for defendant, was recalled and testified further:

I was employed by Mr. Vandeventer to make a survey for a railroad in connection with this water power development. This is a blue print of the survey for the railroad. The railroad was from Turtle-town to the Coleman dam site.

The defendant here introduces the maps of the railroad survey, February 4, 1914, made by the witness McLelland, as Defendant's Exhibit No. 45, (copy attached).

W. A. FAIR, sworn for the defendant, testified as follows:

My name is W. A. Fair. I live on the Hiawassee River about a mile below the mouth of Persimmon Creek. I own some land down there and owned it in 1910. I gave Mr. Smith an option on my land in 1910. He agreed to pay \$866.99 for it. He did pay \$1.00. In three months he paid \$56.99. At another time he paid \$20.00, on April 2, 1912. I do not remember the other payments. He made one other payment. The first payment was \$66.99, the second was \$20.00, and the next \$25.00. He has never paid the balance nor tendered me the balance.

Cross-examination:

I was paid \$66.99 in March, 1911, and \$20.00 on April, 1912, and \$25.00 in April, 1912. It was paid in all about \$121.00. I gave Mr. Smith an option; I never made a deed and went after him for

the balance. I demanded the balance several times after it was ^{paid}. He told me that he would pay it. He said he guessed they could get the money but he did not have it now. That was in 1912. I gave an option to Mr. Vandeventer subsequently. He knew that I had given an option to the Carolina-Tennessee Power Company.

Redirect examination:

Mr. Vandeventer paid every dollar of it.

W. B. RAPER, sworn for the defendant, testified as follows:

My name is W. B. Raper. I live in this County about eight miles south of here. I made a contract to sell these lands to Mr. Smith in October, 1910. One hundred dollars was to be paid in three months, eight hundred and seventy-five dollars in twelve months and eight hundred and seventy-five dollars in eighteen months. The first one hundred dollars was not paid in three months, but in six months they paid me twenty-five dollars after that. I asked them several times for the balance and they said they did not have any money.
233 Mr. Smith said that.

Cross-examination:

My first contract was with Mr. Smith. I afterwards made a contract with the Carolina-Tennessee Power Company for the same land. Mr. Smith paid in all \$200.00. All of it was on the Carolina-Tennessee Power Company's contract, I suppose. On the former trial I said they paid \$100.00 on that contract and then they changed the contract from E. F. Smith to the Carolina-Tennessee Power Company and then they paid me about the first of April, 1911, about \$200.00. It might have been not quite so much. The best I remember, it was something like \$200.00, \$225.00 in all; I think they paid me \$200.00 at one time in April, 1911. I do not remember who the payments were to be made by under the contract with the Carolina-Tennessee Power Company. After that, the Power Company paid me \$25.00 in April, 1912. I never prepared and tendered a deed to the Carolina-Tennessee Power Company and demanded the money. I never thought there was any use. They said they did not have the money. I wanted to make them a deed. He told me they did not have any money and I did not think there was any use. The best I remember he said he did not know what to do. I do not think he told me they were going to pay the balance but did not have the money at present.

Redirect examination:

That contract was for \$1,950.00 and they paid me \$225.00 on it.

Recross-examination:

In the former trial I was asked: "Did Mr. Smith tell you on the occasions that he was going to pay you and that he would pay you

and I answered: "He said if he ever got any money he would." And I was asked: "Did he express any intention of paying you when he got the money?" and I answered: "He told me when he got the money he thought he might pay me." In the former trial I testified: "He just said that he did not have any money, he was looking to get it and he thought he would pay us."

W. E. LOVINGOOD, sworn for the defendant, testified as follows:

My name is W. E. Lovingood. I live down on the river about five miles right opposite the mouth of Nottley River. I owned some lands down there which I owned in 1910. I gave Mr. Smith an option on them and agreed to sell to him for \$9,000. That was to be paid quarterly. He was to give me \$900.00 down, \$2,700.00 in six months and \$2,700.00 in twelve months and the balance in eighteen months. He paid me in cash \$900.00. He did not make any payment on the rest of the \$8,100.00. I never asked him for it. He never offered it to me. I never made him a deed for it.

Cross-examination:

My recollection is my trade was made with Mr. George Smith. This contract which bears my signature is made with the Carolina-Tennessee Power Company. On April 19, 1911, the Carolina-Tennessee Power Company paid me \$900.00 in cash. That was a bona fide trade I made with them. I never asked them for the balance. I saw some stakes put up by Mr. Verdell and his party, but I disremember when; it has been five or six years ago. I saw the stakes they said the water would eddy to. I do not know how many, covering something like a mile. They were probably 100 yards apart, some of them further than others. They were standing, driven in the ground. I am still living on the same land. I gave an option to Mr. McMullen for \$10,500.00. He has never paid that \$10,500.00. They never paid me except \$5.00. I think I told him that I had already given an option or given a contract to the Carolina-Tennessee Power Company. That was before the suit was instituted. Mr. McMullen took his option in 1912. I do not know why it was that Mr. Vandeventer or Mr. McMullen did not pay the \$10,500.00.

Redirect examination:

Mr. McMullen just took a three months' option. All he had was right to buy my property in three months. That was all he ever bought from me.

Q. W. STILES, sworn for the defendant, testified as follows:

My name is Q. W. Stiles. I live on the Hiawassee River about seven or eight miles from here. I owned some land down there in 1910. I made a contract with Mr. Smith about that land, dated September 27, 1910. I was to be paid \$1,200.00. He paid about \$50.00 in cash. The balance was to be paid every six months. He

never paid anything but the \$50.00. I tried to get it; I asked Mr. George E. Smith and Mr. Norvell about it; they said they did not have the money.

Cross-examination:

I never made my title good so Mr. Smith could pay me. That is not the reason they would not pay any more money. Mr. Smith wrote a letter saying that he was not going to pay it until he got a clear title. That may be all right, but there were so many good titles that he did not pay. You did pay some money. I was asked to get up my titles. I did not give an option to Mr. McMullen. I never had any talk with him at all. Mr. McMullen never paid me anything. On September 12, 1913, I gave a contract to Mr. Nelson for Mr. Vandeventer. I did not know that at that time I told them that
236 theretofore I had given a contract to the Carolina-Tennessee Power Company. I could not be sure that there was anything said about that at all. I do not deny giving the contract to Mr. Nelson, but I did not give it to Mr. McMullen. He offered to pay one-third of it. I saw some stakes driven up by Mr. Verdell on that land. They were marked on the outside from where the water would cover. That was when Mr. Verdell was surveying up there.

Redirect examination:

I made a contract with Mr. Vandeventer. He paid me every dollar that came due up to August 21, 1914.

W. H. REECE, sworn for the defendant, testified as follows:

My name is W. H. Reece. I live in Shoal Creek township. In 1910 I owned some lands in Shoal Creek township on the Hiawassee River and gave an option, dated October 3, 1910, to Mr. Smith for them. The purchase price was \$1,600.00. He paid me \$1.00. In April, 1912, he paid me \$60.00. That was when Mr. Ketcham was down here. I came to town and got that. This was in April, 1911, and in April, 1912, Mr. George E. Smith paid me \$25.00. After that I saw him once and talked to him. He said he did not have no money and could not pay it. I asked him if he was going to fall through and he said he did not hardly think he would, but he did not have any money and did not know what he was going to do.

Cross-examination:

The \$60.00 was paid to me in April, 1911. And \$25.00 was paid me in April, 1912. In the former trial I testified: "I talked to Mr. Smith once after that and he said he did not have no money and said
237 that he expected to get some and that he would pay it and pay the interest if I would hold up on it awhile." He offered to pay the interest. He did not say whether he expected any money or not. I asked him if he was going to fall through and he said he did not think he would. I am not trying to deny anything.

J. M. MOORE, sworn for the defendant, testified as follows:

My name is J. M. Moore. I live in Murphy. I own some property down on the Hiawassee and Nottley Rivers. I recollect when a condemnation proceeding was brought against me by the Carolina-Tennessee Power Company in June, 1911. Nothing was ever done in regard to that suit. We filed a complaint and the day came for trial and there wasn't nothing done. It was before the Clerk of the Court. The suit was filed by the Carolina-Tennessee Power Company. I helped survey with the Mullen force. I was one of Mr. Mullen's men. I saw some stakes up along the river. I am one of the men that put them there. We put some down on the line which was called the level and put some on the mountains which was called the contour line.

Cross-examination:

That was in the Mullen party. The stakes that I am talking about were put up on Beach Creek and Persimmon Creek. And Grape Creek and Hangingdog Creek, and the river. Mr. Mullens was the head man on the survey. He was not doing the work; he was over-seeing it. The stakes on the contour line was drawn from the base line on the river and on the bluff where it naturally went up on the bluff or wherever it might be up on the hill.

T. M. RAPER, sworn for the defendant, testified as follows:

My name is T. M. Raper. I live 15 miles down in the west end of the County on Shoal Creek. I owned some land on the Hiawassee River in 1910. I sold Mr. Smith a piece of land down on the river for \$1,560.00. He was to pay \$25.00 down, \$425.00 in three months, \$460.00 in six months and \$460.00 in twelve months. He paid \$25.00 and paid no more. I do not know whether I ever tried to get him to pay it or not; I expect I had a talk or two with Mr. Smith about it. He claimed that the Company did not have the money, that they would pay it if he should get hold of it, probably.

W. M. RAMSEY, sworn for defendant, testified as follows:

My name is W. M. Ramsey. I live in Murphy. I owned some land in this county, five miles below here on the Hiawassee River. I had a contract to sell them to Mr. E. F. Smith, or gave him an option, rather, for \$7500. He paid me \$5.00 at the time he took the option. Under the option he was to pay \$749.56 in three months, \$3,371.73 in twelve months and \$3,372.75 in eighteen months. He paid altogether about \$275.00. He has never paid the balance.

Cross-examination:

The first payment was \$150.00 on August 16, 1911; the next payment was \$100.00 on November 19, 1910. That was the first one. The date of the receipt for \$25.00 is April 11, 1912. At the last

trial I testified that Mr. Smith told me at different times they would pay me, and after the time ran out, Mr. Smith said he would pay the money and the interest. I have talked to Mr. Norvell at different times. Mr. Norvell has talked all along like he thought they would do business.

Redirect examination:

The amount due has not been paid.

239 Recross-examination:

I gave an option to Mr. McMullen through Mr. Nelson for \$10,000.00. My recollection is they paid \$5.00 at the time they took the option.

Redirect examination:

There was no more to be paid; it was just an option, a contract to sell.

A. A. FAIR, C. S. C., sworn for defendant, testified as follows:

I live in Murphy and am Clerk of the Superior Court and have been Clerk of the Superior Court since December, 1906. My brothers and sisters and I had a little tract of land opposite the Fowler land on the river. I offered to give the Carolina-Tennessee Power Company my interest in it. My offer was made to Mr. E. F. Smith or Geo. E. Smith. I do not remember whether there was any contract drawn or not. I do remember about when I offered to give him my interest and he suggested that I take \$5.00 as a consideration to make it a valid instrument, and they gave me \$5.00 for myself and \$5.00 for each one of the other heirs. I think it was \$30.00 they gave me. I do not remember how long I kept that money; it was up until a little while before Mr. George E. Smith left Murphy. Mr. Smith asked me to give it back; I gave it back. I am shown two maps, plaintiff's exhibit No. 7 and 7-A. I was Clerk of the Superior Court on June 21, 1911. These maps were not filed with me as Clerk of the Court on June 21, 1911, by Mr. Smith or Mr. Norvell, both or either of them. They are not marked filed at all. I could not tell you when is the first time that I have any recollection of having heard of these maps. At somebody's instance, I was caused to look for the maps but I do not remember when it was. In the last trial I testified: "I have no recollection of

240 any maps being filed, not the slightest. I do remember that Mr. Norvell came to me, it does not seem like it has been a year ago, something about the maps. I even had forgotten when I heard Mr. Norvell on the stand, he came to me something about these maps, and possibly had them or showed them to me within the last year. I will say it has not been a great while ago. That is all the recollection I have as to those maps, as to any maps being filed. I have no recollection of it." That is correct. All of that was given in April, 1915, two years ago. I do not recall how long it was

before the former trial that Mr. Norvell came to me and asked me something about the maps; I think several months, a few months, maybe six months, or something like that. My recollection is it was sometime in 1914, I disremember, as I stated, until he spoke to me about it and asked me if I didn't remember so and so and I did have a recollection of some kind of a conversation that I spoke of, but I do not know what it was. Prior to the last trial of this case I made search of our office for these maps. I looked where I usually place maps; I just took a general look. I looked in the vault room. I could not find the maps there. I do not know of my own knowledge who found these maps in the vault. I know who went to look for them, who showed up with them. The first that I knew of the maps, my Deputy, who is my son, came to me in the court room and said: "I found these maps." That was during the last trial, is my recollection. That is the first time that I have any recollection of having seen them. I remember something about a conversation with Mr. Norvell, I do not remember what it was, but it was in regard to the maps. I have no idea of when I saw them, if I ever saw the maps; I have no recollection of it. I have been Clerk since December, 1906. As to my practice relative to marking papers that are filed in my office, that was one of the first things I learned 241 when I went there; that was my conception that I had of the law at that time and what I have yet, and that was one of the first things that I learned to do. It has been my custom and I cannot recall a single instance when anybody requested anything to be filed by anybody that I failed to mark it filed. I cannot recall a single instance in variance to that in the eleven years that I have been there. I have no recollection that Mr. George E. Smith and Mr. Norvell, on June 21, 1911, brought these maps to my office and put them on my desk and told me that they were going to start condemnation suits and that under their charter they had to file these maps. It is possible that I could have forgotten but I do not think so. That is, if they said anything about the filing. They might have brought papers and wanted to leave them; it is possible, but I am pretty sure they did not. If any one came with papers for filing, I would have remembered something about them. I am pretty sure that I would have marked them filed. They have not been marked filed since. They have been in the records of this case.

Cross-examination:

It has been my custom to mark papers when they are filed in my office. In the former trial I stated that I always do that unless by oversight. At the former trial I testified that oversights occur with everybody. We are liable in this busy life to overlook some matters. When pleadings are filed I undertake to put the filing dates on the pleadings in each case. It is possible that there are some papers not marked filed. It is my intention to mark them filed. In response to your request that I look at the amended complaint in this case and see if it is marked filed, I will say that I do not say it is filed; I say it is in the court papers, but I don't say that it is filed. The papers

shown me of Sumner & Martin, I don't have any idea that I
242 ever saw it. It is signed by Alley & Leatherwood. It is in
the court papers and is not marked filed. I do not claim that
it is not marked filed as an oversight. I have no idea that I ever saw
it. When a paper is filed I always mark it filed and put the date
on it. The paper shown me in the case of Mull vs. The L. & N.
Railroad Company, I do not remember having seen before. I do
not say it is not in the court file, but I want you to find one that
is not filed when it has been requested to be filed. The attorneys
carry the complaints and answers out during the court and I do not
know when they take it out or when they bring it back. In the case
of Outcault Advertising Company vs. Fain & Howell, you show me
the amended answer and ask if it was ever marked filed; if it was
requested to be filed, I guess you will find it marked filed; that could
have been just like any other case where it was carried out after it
was sworn to and put back in the files by the attorney. In this
case I find the papers; it is sworn to before me, but I say if it had
ever been presented for filing I would have marked it filed. I do not
know that it was ever presented for filing. I say that this amended
answer has never been filed in my case and yet it is in the papers.
I don't remember that I swore to it last December for that purpose.
I guess I did. I don't think Mr. Norvell left it with me, but I am
not certain of it. When it was sworn to by me last December I expect
I gave it back to Mr. Norvell; I do not recollect; I have no recollection
of his leaving it with me. I think I would have filed it if Mr. Norvell
had given it to me to be filed. I will say this positively, that every
paper that has been presented to me with the request for filing, I
have filed and marked it filed; I say that as a positive assertion. In
the case of Murphy vs. McDonald, in reference to the affidavits in
the case, if they were presented for filing I marked them filed.

243 Among these affidavits there is one of Lovingood; that is
marked filed. There is one signed by Mr. Norvell not marked
filed. Mr. Norvell might have put it in there. I do mean
to say that he did put it in there and I didn't know anything about
it. I do not say that he slipped it in there. He might have carried
it away after it was sworn to and then brought it back and put it in
there. I do not think I would have overlooked filing it if it was
requested to have been filed. I don't say that Mr. Norvell would slip
a paper in; I say he might have put a paper in there. You may
find several put in by different attorneys that way. All of the
affidavits that you handed me in the Outcault vs. Fain case, except
one, were marked filed. Those that were requested to be filed you
will find them marked filed. When it is in the office and not marked
filed, I say that it was never presented to me for that purpose. They
might have told me to put it in the papers, but it was never presented
to me for filing; they might have given it to me to go into this file,
but it was never presented for filing. If they had brought the papers
there and said they wanted to deposit them, I don't think I would
have marked them filed. If they had brought them and said: "We
brought these maps to be deposited, as required by our charter," I
might not have marked them under such a request. Relative to the

maps and records brought in there, I do not think that I ever failed to file one upon request. I am swearing and that is my positive statement. I do not think that I ever failed a single time, where a man has come in with the request to file them, that I have not marked them filed. None of the maps shown me are marked filed. If they were presented to me for filing, they were; if not, possibly you won't find them marked. I do not know how they came in there, but if they came in there and requested me to file them, that is just what I would swear. I do not know whether they did or not. There are no books to record maps and blue prints in when they are filed. The State of North Carolina does not provide a book for the clerk's office in which to record maps or blue prints. I guess these blue prints and maps which you show me are not marked filed. I offered to give Mr. Smith my interest in a little tract of land below Beaverdam Creek. I do not know if it would be flooded by a dam at Appalachia. It is 12 miles away. In the former trial I said that I did not have any recollection, one way or the other, about Mr. Smith and Mr. Norvell bringing those maps to the office in 1911. I remember about Mr. Norvell having a talk with me before the present suit was brought. I looked where I usually kept the maps. I would not say they were on the racks. In the former trial I said that I marked papers filed unless it was an oversight and that oversights occur with everybody and with me. My son showed the maps to me. On the former trial I was asked: "Mr. Fain, you would not deny that Mr. Norvell and Mr. Smith did put them or deposit them there when Mr. Norvell said they did in June, would you?" And I made this answer: "I would not attempt to say they did or they did not." I would not attempt to say they did not." I will not now attempt to say that they did or did not deposit them in my office. I won't say about depositing them, because I do not know. I have no recollection about Mr. Dewar and Mr. Fain going to my office in 1914. I do not remember that he came with Mr. Witherspoon and that Mr. Witherspoon introduced Mr. Duer to me in the early part of July, 1914, and that Mr. Dewar said that Mr. Norvell said the maps were there. If he will go on the stand and swear he was in there, I would believe that he was. The map which you show me is in a suit. It belongs in a case. The maps in a civil suit are usually produced about the time of the trial and are not requested to be filed. These are maps brought there in partition proceedings. They are some kind of court maps in regard to some kind of cases. They are not marked filed. All of these maps were not marked filed unless they are some maps that were requested to be filed. After the trial, they usually gather them up and take them to my office; they are usually scattered all over the judge's desk and over the room, and they pick them up and some one takes them down to my office. I do not know if any of these were filed; they show for themselves. I do not know a thing in the world about them. I have not seen any of them that were marked filed. They don't usually file the maps; they come in just like I said. I do not remember a blue print filed by me.

Redirect examination:

The maps shown me were exhibits in civil cases. I give the lawyers the record that they require and try to do everything that the lawyer asks me to do. I overstep my authority a little. I let our home attorneys take the papers out and that I know I ought not to do, and if a lawyer wants to put a paper in there, he can do so, but I would not say it was slipped in. I said that Mr. Norvell put one there; I did not say that he slipped it in.

H. A. FAIN, sworn for the defendant, testified as follows:

My name is H. A. Fain. I am Deputy Clerk. I have been since December, 1914. I have seen the two maps, plaintiff's exhibit No. 7 and 7-A. I first saw these two maps on March 27, 1915; that was just before the last trial of this case. They were back in the vault on the right side on the back shelf. My father and some one came in the office and could not find them and I went and looked for them myself, I thought possibly they had overlooked them. This was two or three weeks before the trial. I looked all over the vault and office. I looked on all the shelves and in the corners of the vault and anywhere that I thought the maps could possibly be; I looked on the racks and book-shelves. That search was made three or four weeks before the trial. I did not find them in the office or in the vault. They were not in the vault. I found them on March 27, 1915; that was just prior to the last trial. They were then on the right hand side of the vault on the back shelf, the last ones. I think I had looked at that place before; they were not there then. Mr. Martin and Mr. Dewar came in there and asked me for them and I went back there and found them.

Cross-examination:

I have been Deputy Clerk since December, 1914. I was not Deputy on June 21, 1911. I do not know whether these maps had been filed or deposited and taken out before I came in there. As Deputy I never looked for these maps from the time I came in office the last part of December, 1914, until just before the case was tried. I looked just when they came and wanted to see them. I went in there with Mr. Martin and Mr. Norvell and Mr. Duer and found the maps. I do not know whether Mr. Norvell had been gone to Raleigh for two or three months before that time. On the last trial the question was asked me: "Mr. Fain, where were they (referring to the maps) when you found them?" And I answered: "Back on the right in the vault on the rack at the last of the book-shelves, the last book-shelf in the vault." I was also asked: "Do you know how long they had been there?" And I answered: "No sir, the first I saw them was when we found them." I had never looked for them but once about two weeks before that date. I looked all over the office. In response to your question that I might have overlooked them, I replied that I am not quite blind. I am sure I looked where the maps were.

found. I do not think I could possibly have overlooked them.
47 I do not know how they got in there. I did not find them in there when I looked the first time. I think these maps have been in the Clerk's office from the day they were found until now. The maps were put back in the same place they were found. I do not know where they got them when the case came up.

The defendant introduces in evidence bond for title from P. E. Nelson and wife to Hugh F. Vandeventer, dated the 1st day of September, 1913, registered on the 26th day of February, 1914, in book No. 28 of Deeds, page 196, as Defendant's Exhibit No. 46.

Defendant offers in evidence the report of Charles O. Lenz to H. Vandeventer. This report covers in detail the calculations, estimates and information given in the testimony of the witness Charles Lenz.

At this point the plaintiff introduced other witnesses.

L. E. BAYLESS, sworn for the plaintiff, testified as follows:

My name is L. E. Bayless. I have been living in Murphy 16 years. I know Mr. Ketcham and have known him about six or eight years. His general character is good. I know Mr. George E. Smith and have known him about the same time. His general character is good. I know Mr. E. B. Norvell; his general character is good.

A. B. DICKEY, sworn for plaintiff, testified as follows:

I know Mr. E. B. Norvell and have known him for 20 years or more. His general character is good. I know Mr. Ketcham and have known him about six years. His general character is good. I know Mr. George E. Smith, and have known him about six years. His general character is good.

48 Cross-examination:

I have never heard anybody say that Mr. George Smith's character was not good. I know that at one time he owed me about \$1,750.00 and I heard nothing from it, and after he got the money he paid me. I never heard anybody say that his character was not good. I never heard it discussed before this suit.

Redirect examination:

This suit has been pending two or three years. My opinion of his character is from dealings that I have had with him. So far as honesty and truthfulness are concerned, I think it is good. I have known him six years. And I traveled over the County, and I would come out with him. When I was Sheriff of this County he would go with me when he was not busy and I never heard anybody say anything against his character. I have known him intimately about three years. I have heard him talked about a right smart. My opinion is based on general reports and what I know of him.

Mr. McNABB, recalled for plaintiff, testified:

I have known Mr. E. B. Norvell about 18 or 20 years. His general character is good. I have known Mr. Ketcham about 7 years. His general character is good. I have known Mr. George E. Smith about 9 years; his general character is good.

Cross-examination:

Mr. Ketcham lives in New York, I suppose. I do not know how he stands in that community. I have never been to New York. I have seen him two or three times. I do not know how Mr. George E. Smith stands in the community in which he lives.

The plaintiff here introduces the evidence of S. W. DAVISON, witness at the former trial who has died since the former trial.
249 The evidence of this witness was as follows:

I know when Lens Hamby and Thurm Hamby lived on the property. They owned some land on the Hiawassee River. I was employed by one of the Smiths that lived on the place to go and trade for this land for the Carolina-Tennessee Power Company. We could not trade. The Hambys seemed to be out of the range of our prices. Their prices were so high that we never did buy it. I guess that was five or six years ago.

GEORGE E. SMITH, sworn for plaintiff, testified as follows:

I will be 59 years old on the 14th of May, I was Vice President of the Carolina-Tennessee Power Company from its organization in 1909 to the end of 1913. In connection with my office, most of the time was spent here. I was here very little in 1909 and 1910. I came down here a few times. One time I spent perhaps five or six weeks here. My brother was living then and had charge of the matters under my direction. He is now dead. His name was Elton F. Smith. In 1911 I came here for the first week in April and stayed here until that fall, in October, sometime. In 1912 I came here the last of December or the early part of January. I stayed here until the first week in October. In 1913, I think I arrived here the last day of February and stayed in this County until the 23d of December. I was here in January of 1914 a short time. While I was here during these years I was looking after the interest of the Carolina-Tennessee Power Company. I had no other business except that. A part of the time I was endeavoring to make contracts for the land; a good deal of the time I was waiting for money to pay off what contracts we had already made and looking after the interest of the Company generally. A good deal of the time I had to spend figuring on what we were going to do with other people's
250 that were coming in and trying to swipe up our deals. I paid out money during 1911 and 1912 on the Power Company's water proposition. In 1913 I paid out the last money that I had in the world, \$500.00, in the spring of 1913.

The witness was asked this question by plaintiff's counsel:

"Q. What was your purpose, or what was your purpose as an officer of the Carolina-Tennessee Power Company, during your connection with that Company and during the years that you were looking after its interests?"

The defendant objected to this question on the ground that it is irrelevant and incompetent, the true question being what was the purpose of the corporation.

The objection was overruled, the Court instructing the jury that the testimony of the witness is to be considered only so far as it may tend to show the purpose of the witness as an officer of the plaintiff's corporation and to be considered only as a circumstance tending to show the purpose of the plaintiff corporation in the action in respect to the maps referred to.

To this question the witness answered: "A. To place our securities and build a dam, to build the dams as contemplated on the Hiawassee River."

To the admission of this evidence the defendant excepted and assigned this as Defendant's Exhibit No. 11.

The witness continued to testify as follows:

While I was looking after the interest of this Company, a part of the time I was taking contracts a part of the time I was paying out money and part of the time trying to keep parties from coming on to what we thought was our own, and part of the time waiting for funds and trying to get them; I never thought of anything else. I have in my hands two maps, marked Plaintiff's Exhibit- No. 7 and No. 7-A. I presume I saw them first in New York City in the office of the Carolina-Tennessee Power Company. We had these identical maps in Cherokee County in 1911. There was a notation in my hand writing on these maps. These notations must have been put on these maps in 1911. Mr. Norvell and I took these maps up to the office of the Clerk of the Superior Court and deposited them with the Clerk on the 21st day of June, 1911, in this County. Mr. A. A. Fain was the clerk, with his office in the Court House. We took the maps to the Clerk's office and told Mr. Fain that we wanted to deposit these maps in accordance with the terms of our charter. We left them there with the clerk. He was in his office in the Court House building. I have no recollection as to what the clerk said; I could not swear to it definitely. These maps were taken there in the Clerk's office during the office hours on June 21st, 1911. I had received a letter that day from Mr. Ketcham stating that the maps should be filed in accordance with the terms of our charter. I wrote Mr. Ketcham a letter that morning before I took the maps to the Clerk's office, stating that I would file the maps that day. This letter which is handed to me is dated, June 24, 1911.

The plaintiff here offers in evidence letters, same being plaintiff's exhibit No. 97, a copy of which is hereto attached.

The witness continues to testify as follows:

I sent that letter to Mr. Ketcham; I deposited it in the United States mail in the Post office in Murphy. I know he got it.

Cross-examination:

I was the organizer of the Power Company proposition.
252 started it in 1909 and worked on in 1906, 1907 and 1908.

I saw Mr. Ketcham in New York in 1908. I did not sell my proposition to Mr. Ketcham. We organized the Carolina-Tennessee Power Company together. I did not let Mr. Ketcham have 50% of my proposition before organizing the Company, nor did I let Mr. Church have 20% of the proposition. We did not let anybody have any per cent of the proposition until the Company was organized. My brother and I owned our interest together. Without the contract before me I can not say what the percentage was that he and I had. I knew that Mr. Ketcham had organized Ketcham & Company for the purpose of dealing in investment securities including the securities of this Company. I knew the contract was made with the Carolina Construction Corporation. I haven't it before me, but the purpose of it was to acquire the balance of the land and build the dams. I am talking about the contract between the Construction Company and the Power Company. I do not know of any trade that Ketcham & Company made with the Construction Company about this water power proposition. I did not receive any stock of the Carolina Construction Corporation for my interest in this proposition. We considered that the stock belonged to us, but we did not take it out of the office; it stayed in the office. I cannot state definitely my percentage of the stock of the Carolina Construction Corporation that I was entitled to, nor can I tell what stock of the Carolina Construction Corporation Ketcham & Company, as Trustees, received for this water power proposition. I was familiar with it at that time and anything that Ketcham & Company did at that time was done with my approval. I did not sell a portion of my proposition to Ketcham & Company. They had an interest in the corporation, but what that interest was, I cannot definitely say. I did not know that Ketcham & Company sold that proposition to the Construction Corporation and I do not know it yet. I got out of the proposition in

253 January, 1914. I do not like to say what I got out of it. I testified that I spent part of my time taking options and making payments and part of the time in trying to keep other people from swiping the proposition. The first person that tried to take the proposition was Mr. Browning. I do not know what he was here to do. I did not do anything to him that I know of; it was necessary for me to be here to keep him off. We started condemnation proceedings for a piece of property that we had to include Mr. Browning in. I did not consider that Mr. Browning was any danger to us. He bought a piece of property for \$100,000.00 and paid \$5.00 on it. There was a receipt on record for it. We had made all the efforts we could to get a price on that proposition of the Coit property, and we begun condemnation proceedings and had to include Mr. Browning on account of that \$5.00. My recollection is that that is the only

reason we included Mr. Browning in that suit. The Coit property was at the extreme right of our map. Mrs. Coit lived in San Francisco. I was informed that a man went to San Francisco to see her; that was Mr. Smathers. I believe he went in the interest of Mr. Browning. I do not remember that I sent a telegram to Mrs. Coit; if I did, it was in regard to my letters I had written her agent. It is not likely that I did, though I think I received a letter. I guess I got a letter from the Trust Company's officer stating that my letter had been turned over to her. I never wrote her a letter trying to buy the mineral interest; I never knew there was any. The only reason that we included Mr. Browning in the suit, we wanted the land and he had an option on it. I never told Dr. Wells that I sent a telegram to Mrs. Coit, for I never sent one. The largest part of my time was spent here waiting for money. When Mr. Adams tried to start a proposition on the Hiawassee River I was living in Atlanta. I expected that to be my headquarters and wanted my family there. I received a telegram to come here at once and I found that J. W. Adams was ruining my proposition. I had known Mr. Adams for about ten years and had more or less business relations with him, and he was quite surprised when I went to Chattanooga and called on him. I wrote him a letter and told him he was only wasting his money and helping us to waste some of ours, and he afterwards came here to Murphy and said he would not do anything to interfere. The reason that we did not take up these options that we had from the people was because we did not have the money. I have examined the lower reservoir map of the Carolina-Tennessee Power Company. It is a map of the properties of the Hiawassee River in the lower basin. A dam site is not marked on the map. I testified that Mr. Norvell and I went to the clerk's office with these maps. I believe we went together. As to whether I know that we went together or whether I went alone, my letter to Mr. Ketcham says "we." We filed the maps. The reason I say we went together is because the letter stated it; that letter refreshed my memory, and I was satisfied after reading that letter or I would not have said "we." If I had done it myself I would not have said "we." My testimony about it today is based on my recollection as refreshed by that letter. As to looking at that letter and remembering if I filed the maps on the 21st of June, I said I had written a letter on the 21st of June stating that I had. That is not the letter. I wrote another letter. I do not know where that other letter is. I have seen my carbon copy. I have not got it here. I said on the 21st of June I will file the maps today, and I did so immediately after mailing my letter. The only reason I recollect the date is from the information in that carbon copy of the letter. I can state it on my oath. I know I filed the maps, but the exact date I refreshed my memory by the letter. My recollection is that Mr. Fain was there at his desk when I filed the maps. I laid them on his desk, I believe. I saw the maps again a week after that. I got them at that time; I took them from the office. I took them to Mr. Norvell's office. They stayed there two days. I think it was about a week until I took them out again. I think there was a letter stating I got them on the 28th.

It was one of my letters. I know it was my letter. The maps stayed in Mr. Norvell's office two days. I took them then back to the clerk's office. I think I laid them down on the desk; I did not put them away anywhere. I can not swear positively who was in the office at that time but I think the Deputy was there, but I would not take an oath. I do not know when they were gotten out again. The Deputy I mean was Mr. Keener.

Redirect examination:

When I got the maps out about a week after filing them I got them by permission of Mr. Keener, I think. I told him that I wanted to use them that day and he said I could have them. I told him I would bring them back in a day or two. I presume I told him I wanted to borrow them. I did not go and take them back. He let me have them for a day or two. I did not go and take any papers out of anybody's office. I told him that I wanted them for a day or two. We were in the Clerk's office. I was assured that I could have them. At that time I was Vice President of the Company and Mr. Norvell was general counsel. When I say "we," I refer to Mr. Norvell and myself. When I took these maps back to the Clerk's office after I got them, I think Mr. Keener was in the office at that time. I said to him: "Here are these maps I borrowed." I laid them down. I took them back to the Clerk's office. I don't know what he did with them. It was during office hours that I took them back.

L. B. DUER, sworn for plaintiff, testified as follows:

My name is L. B. Duer. I am 34 years old and live in
256 New York and am an attorney. I am associated with the firm of Simpson, Phacher & Bartlett. My firm is general counsel for the Carolina-Tennessee Power Company. I think we became connected with the Company in the early part of 1914, when Mr. Powellson asked us to take charge of the Company's legal matters. The first time that I came to Murphy was about July 23, 1914, and we stayed until about July 27th or 28th, 1914. When I first came to Murphy in July 1914, I asked Mr. Norvell if he had filed the maps, plaintiff's exhibit- No. 7 and 7-A, and he said he had filed them during the year 1911. Mr. Norvell stated that he had filed the maps in 1911 and that thereafter he had taken the maps out and had taken them back to the Clerk's office sometime early in July, 1914. I asked Mr. Norvell in his office where the maps were and he stated that they were in the Clerk's office. I went over to the Clerk's office and I met the officer in charge, and I asked to be allowed to examine the maps or see the maps. I examined them in the office of the Clerk of the Superior Court, sometime between July 23, and the 27, 1914. The Clerk's office was in the Court House at Murphy. I don't know what the Clerk did or said when I asked to see the maps; he either directed me, I don't know it was the Clerk, but it was some officer at the desk, he was in charge of the office, and he either directed me to where the maps were or brought them to me. Which

was done was not impressed on my mind. I examined the maps in the office. I left them with the officer. I did not take them out of the office. Those were the identical maps that I examined in July, 1914, in the Clerk's office. I saw Mr. Powellson on my return from the Clerk's office and told him that I had examined the maps and they were in the Clerk's office. I next saw the maps just previous to the last trial, but I do not recollect the exact date. The last trial commenced either the last of March or the first of April, 1915. Mr.

257 Martin and myself, and I think it was Mr. Norvell, went to the Clerk's office and I think that Mr. Norvell went and got the maps and looked at them on the window-sill of the office. They were on the rack in the vault, I think, thereabouts, or standing in the corner. I think they were standing in the corner. Mr. Martin and Mr. Norvell were with me when I found these maps in the office. I think Mr. Harry Fain was in there.

Cross-examination :

I do not know of a search that had been made two or three weeks before that and they could not be found. I went back and told Mr. Powellson that I had examined the maps. I do not think I testified to that at the last trial. In July, 1914, my recollection is that either the Clerk directed me to them or handed me the maps. I had not met any of the gentlemen at Murphy at that time and I do not know whether it was the Clerk or his Deputy. I do not recollect whether, in July, 1914, when I asked Mr. Norvell about these maps, he looked at his letter to see when he had written about these maps before telling me anything about it. As to whether I recall anything at that time about the letter which he had written, I would not like to say definitely, but before I came to Murphy I had examined the correspondence that Mr. Powellson had turned over to our office, and it might have been that I saw the letter then. I rather think it was then, but I would not want to swear it. At the last trial I said that I did not recollect whether Mr. Norvell had told me that the maps had been filed in June, 1911; I do not think I recollect that now. I remember of hearing him speaking and he told me that they had been filed, but I cannot recollect whether he said in 1911. I do not recollect when Mr. Norvell said he had taken the maps out. I do recollect that he told me he had taken them back early in July, 1914.

258 D. WITHERSPOON, sworn for the plaintiff, testified as follows:

I live here in Murphy and am an attorney. I have known Mr. Duer about two or three years. I first met him in the latter part of July, 1914, in Mr. Norvell's office in Murphy. Mr. Duer was here investigating the status of the Carolina-Tennessee Power Company and he was asking about the various records, etc., and I remember his asking Mr. Norvell about the maps of the Carolina-Tennessee Power Company, whether or not they had been filed in pursuance to the charter, and Mr. Norvell stated that they had been, and I think

he gave the dates they had been filed. I do not recollect the dates given. Mr. Norvell also stated that the maps had been taken away from the Clerk's office and I think he said in the preparation of some condemnation proceedings. I was one of the counsel for the Carolina-Tennessee Power Company. Mr. Norvell said he had taken the maps from the Clerk's office for the purpose of preparing some petitions in condemning some lands. I do not remember what date he said he had taken them back. I went with Mr. Duer to the Clerk's office in July, 1914, and I think I introduced him to Mr. Fain and asked Mr. Fain about the maps of the Carolina-Tennessee Power Company, and Mr. Fain stated that he did not have any recollection of them, and I told him that Mr. Norvell said the maps had been filed or deposited, and he said that if Mr. Norvell said that, they must be here, and I left and didn't wait to know what was done. It was Mr. A. A. Fain. Mr. Duer was back in the office when I left. This was about 11 o'clock in the morning.

Cross-examination:

I was not one of the attorneys in these condemnation suits. I went to the Clerk's office for the purpose of introducing Mr. Duer. I did not see the maps. I had not known Mr. Duer before that time. I have seen him several times since. I did not see
259 the maps at that time; I saw them afterwards.

Redirect examination:

When I saw the maps afterwards they were down at Mr. Norvell's office.

STANLEY R. KETCHAM, recalled for the plaintiff, testified as follows:

I was present at the meeting of the Board of Directors of the Carolina-Tennessee Power Company held in New York on February 4, 1911. Mr. Cox, Mr. Smith and Mr. Branstader were the other Directors present. Mr. Smith had come to New York with his brother, and we had this meeting and Mr. Smith told us of all the property that had been purchased and all of the contracts that had been made, and I compared his statement with the information I had indicated on the map that I had on my desk. These maps are blue prints similar to the ones that have been used in this trial and the trial previous to this, and if Mr. Smith reported anything that was done, I indicated it by certain colors. Mr. Smith had a complete list of all the other properties that were required, and he had an estimate of the probable cost of the property that we did not own or have under contract. The Directors discussed the thing and they said for Mr. Smith to go ahead and acquire all of the property that was necessary that we did not own or that was not under contract that would be required to build the developments or the dams at Appalachia and the dam at Beaverdam. Mr. Cox first said that. Mr. Smith asked me if he should go ahead and I told him

that he should. After that Mr. Smith came down to Murphy and spent his time endeavoring to make contracts.

W. V. N. POWELLSON, recalled for the plaintiff, testified as follows:

I was present at the meeting of the Board of Directors of the Carolina-Tennessee Power Company held in New York on June 16, 1914. As to what lands were included in the resolutions passed at that time under which I was authorized to purchase the lands necessary for the purposes of the Company, I will say that we were to go ahead and purchase all the lands lying under the contour lines for both basins that had not already been acquired by the Company. At that time I had these plats and maps before me. I first came to Murphy looking after this proposition in June, 1913. I went down on the river on that occasion, with Mr. Smith, from Murphy to Appalachia. I saw numerous stakes on the river indicating a previous survey. Mr. Smith pointed out the dam sites and we walked up the side of the hill to look at the character of the rock, and I asked Mr. Smith about the stakes and he said his party put the stakes there. I was only on the north side of the river. The stakes were driven into the mountain side, I should say at distances up to 160 feet, about the water surface. I would not like to give an estimate of the number of stakes that I saw, but there was enough to make a positive impression on my mind. I have made an estimate of the amount of lands that the Hiawassee River Power Company and Mr. Vandeventer held under contracts at the beginning of this suit; it was about 13 miles. Of that same land the Tennessee Power Company had contracts for five and a quarter miles and the Carolina-Tennessee Power Company's contracts were older than the others. When Mr. Duer and I were here in July, 1914, he said that he had gone over to the Clerk's office and examined the maps showing the land acquired by the Carolina-Tennessee Power Company on the Hiawassee River and had found them there. He told me this about July 25, in Murphy. I have known Stanley R. Ketcham about five years. His general character in New York is very good. At the last trial I did not testify anything about what Mr. Duer told me about the maps; I was not asked about it, as I recollect.

The defendant offers other testimony.

JOHN KEENER, sworn for the defendant, testified as follows:

My name is J. E. Keener. I lived in Cherokee County. I was Deputy Clerk of the Superior Court in 1912 and 1914. I know George E. Smith. When I was Deputy clerk I had other employment in the store for Mr. Fain. When I was needed in the Clerk's office I was in the Clerk's office. I have no recollection of Mr. Smith coming in and getting any maps of the development of the water power Company. I remember seeing him in the office, but I

have no recollection of getting any maps for him, nor of his bringing any maps back.

Cross-examination:

I worked for Mr. Allen Fain, as clerk, and for John Fain in the store. Mr. John Fain owns some stock in the Hiawassee River Power Company. I have no recollection, one way or the other, about these maps. I would not swear about them because I have no recollection about them.

The foregoing was all of the evidence that both the plaintiff and defendant introduced in the case. At the close of all of the evidence the defendant renewed its motion for a non-suit upon demurrer to the evidence. The motion was overruled and the defendant excepted, the same being Defendant's Exception No. 12.

The Court then submitted to the jury the issues as follows:

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Issues.

1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint, and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A? Answer "Yes" (by consent).

2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant Company in July 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer "Yes."

3. Did the plaintiff, prior to the commencement of this action on the 21st day of August 1914, abandon its said locations and proposed plans, as alleged in the answer? Answer "No."

4. Did the plaintiff file the maps or plats of its said locations in the office of the Clerk of the Superior Court of Cherokee County on or about June 21st, 1911, as alleged in the complaint? Answer "Yes."

5. Did the plaintiff on or about the 17th day of August 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs and public works which had theretofore been marked out on the Hiawassee River, as alleged in the complaint? Answer "Yes" (by consent).

6. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer "Yes" (by consent).

7. If so, did the defendant thereafter, by authoritative corporate action, adopt said locations, and if so, when? Answer "No."

The Court thereupon charged the jury as follows:

263 GENTLEMEN: When an action which is properly constituted in the Superior Court comes on for trial, the controversy as between the parties is ordinarily determined by

the Court, or Judge, and a jury. When we undertake to determine such controversy, we find that there are certain well established principles which relate to procedure, and the parties have a right to expect and to insist that these principles be observed by the Court and by the jury. Let me direct your attention to the principles to which I refer. The functions of the Court and the functions of the jury are entirely separate and distinct. The Court has no right and certainly no inclination, to express or intimate an opinion as to the facts. There is indeed no judge of the facts except the jury. You are to determine the facts from the evidence which is introduced and admitted by the Court in this case by the testimony of the witnesses and the record of evidence which has been introduced. The evidence then constitutes your chart and compass so far as the facts are concerned. It is especially important, gentlemen, that the issues be answered according to your findings of the facts from the evidence. It is the province of the Court to declare the law, to say what the law is as applicable to the evidence. In North Carolina the attorneys who appear in a case have a legal right to argue the law as well as the facts. While this is true, it is nevertheless the duty of the jury to accept the law as stated by the Court, and if any proposition of law has been stated by counsel on either side which is in conflict with the instructions which the Court shall give you as to the law, it is your duty to be guided by the instructions of the Court, because if the Court should commit an error of law, such error may be corrected in another tribunal, but if an erroneous statement be accepted from counsel, there is no means of correcting it. I have made these remarks for the purpose of emphasizing the necessity of your keeping in mind the elementary principle that the issues submitted are to be decided entirely and exclusively upon the law and upon the evidence. You are to find the facts from the evidence, and after doing so, you are to apply your findings to the principles of law which the Court states, and then answer the issues accordingly.

In approaching a consideration of the issues, the first questions in which you are interested are these:

What is the nature of this action? What is the theory of the plaintiff? What is the theory of the defendant? What are the contentions of the parties?

Now, let us see: The plaintiff has introduced in evidence Chapter 16 of the private laws of 1909 incorporating the Carolina-Tennessee Power Company which was ratified on the 16th day of February, 1909. The plaintiff has introduced the minutes of the first meeting of the incorporators reciting their acceptance of this charter May 25th, 1909, and the enactment of certain by-laws. The plaintiff is authorized by its charter to acquire lands by purchase, condemnation or otherwise, together with mill sites and other property, and to manufacture electricity. The defendant has introduced its charter which was filed in the office of the Secretary of State, July 13th, 1914. Under this charter the defendant is authorized to acquire land by purchase or condemnation and to manufacture electricity.

The plaintiff contends that it had the land which it purposed to acquire surveyed and defined before similar action was taken by the defendant, and thereby acquired the first and better right to the property.

The defendant contends that it had surveyed and defined the property which it purposed to acquire before similar action of the character was taken by the plaintiff, and thereby acquired the first right.

In this connection, it may be well to direct your attention to this proposition of law. In a case of a contest between two corporations, which are engaged in a public utility and are clothed with practically the same power of condemnation, the first location belongs to that Company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the Company.

There is another principle: Where the priority of right has been secured by priority of location, such prior right cannot be defeated by a rival Company agreeing with the owners and purchasing the property, nor can it be defeated by condemnation. That is to say, if one rival Company surveys, defines and marks and adopts the location of property which it purposes to acquire for the purpose of a public utility, another company cannot occupy the same territory and defeat the claims of the first by condemnation or by purchase.

One phase of the controversy in this action depends on your answer to the question: Which of the parties to this action acquired the first and better right?

Plaintiff contends that as early as 1909 it had surveyed the property which it purposed to acquire and adopted the locations marked by the surveyors and represented on the large plat. The defendant denies this and contends that before the adoption of any location by the plaintiff, it acquired the location of certain property represented on the small map.

Seven issues, gentlemen, are submitted upon the pleadings. The first is this: Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint and as indicated on the maps offered in evidence by plaintiff marked Exhibits 7 and 7-a?

You are relieved of any difficulty as to this issue, because the parties consent that your answer shall be "yes." I have written the answer to this issue by consent of the parties.

The second issue, then, is this: If so, did the plaintiff in the year 1909, and thereafter, but before the organization of the defendant Company in July, 1914, adopt said locations by authoritative corporate action as alleged in the complaint?

The burden of this issue is upon the plaintiff. The plaintiff is required to satisfy you by the greater weight of the evidence that in the year 1909, or thereafter, and before the organization of the defendant Company in July 1914, it did adopt the locations referred

in the first issue by authoritative corporate action, as alleged. Now, if you are so satisfied by the greater weight of the evidence, you will answer this issue "yes" and if not, answer it "no."

The word adopt as used in the issue means to accept or receive or make one's own. Authoritative corporate action means action taken by virtue of authority of the corporation. Ordinarily such authority is exercised through a Board of Directors or other officers whose functions relate to the particular matter.

The plaintiff has offered in evidence the certificate of incorporation of the Carolina Construction Corporation dated the 28th day of April, 1909, together with the first meeting of the Board of Directors dated May 8th, 1909. The Carolina Construction Corporation by the terms of its charter was authorized to enter into any contract for constructing and equipping any water power, electric power, and so on.

The plaintiff has introduced the first meeting of the Board of Directors of this Company, dated, as suggested, May 8th, 1909.

In the minutes of this meeting appears the following resolution:

"Whereas, Stanley R. Ketcham, as trustee, has entered into an agreement dated May 12th, 1908, with the Ambursen Hydraulic Construction Company to construct a water power plant on the Hiawassee River in North Carolina in which it was recited that the said Ketcham was trustee for a corporation to be formed to develop said water power, now, on motion duly seconded, it is resolved that this corporation, that is the Carolina Construction Corporation, assume the said contract of May 12th, 1908, and enter into a new one of same tenor which the officers are hereby authorized to execute and affix the seal to."

Now, the contention of the plaintiff is that the Carolina Construction Corporation assumed the contract originally made between Ketcham and the Ambursen Company and thereby acquired its right, and that it afterward made a contract with the plaintiff in this action in which these rights were to be exercised in connection with the rights of the plaintiff.

The plaintiff contends then that the Carolina Construction Corporation made a contract with Ketcham & Company and assumed the contract made between Ketcham & Company and the Ambursen Company represented by the two maps referred to as Exhibits 7 and 8.

The plaintiff has introduced the minutes of the first meeting of the incorporators of the Carolina-Tennessee Power Company, dated May 25th, 1909. In the minutes of this meeting appears the following resolution:

"Whereas this corporation was formed, among other things, for the purpose of acquiring water power and electric plants, developing and equipping the same, that is the Carolina-Tennessee Power Company, plaintiff in this action, and whereas the Carolina Construction Corporation, a New York corporation, is the owner of a water power proposition on the Hiawassee River in the County of Cherokee, North Carolina, and is willing to and de-

siours of disposing of the same to this corporation, and has also proposed to this corporation that it will erect such dams, power houses and buildings as may be necessary to develop the said water power proposition, and will acquire and convey to this corporation all of the lands necessary for such development and will install electrical and other apparatus necessary to provide a complete operating plant in consideration of the issue and delivery to it of bonds of the corporation, and \$4,990,000.00 of the capital stock, and whereas it is considered to the best interest of the Corporation to accept such proposition which has been submitted to this meeting in the form of a proposed contract, it is now unanimously resolved that the directors of this corporation are authorized to enter into an agreement with the Carolina Construction Corporation to do work proposed in said agreement for and in consideration of the issue and delivery to it of the bonds and stocks in said contract provided, and to issue and deliver the stocks and bonds to said Carolina Construction Corporation as in said contract provided."

Plaintiff has introduced in evidence also a contract between the plaintiff and the Carolina Construction Corporation in which, among other things, appears this clause: "For and in consideration of the delivery to it of the stocks and bonds hereinafter mentioned, the Carolina Construction Corporation agrees that it will obtain and complete a good title to all the lands necessary to erect a dam about one hundred and twenty feet in height, and all lands that shall be overflowed and flooded by the water impounded by such dam, and that it would cause the same to be vested in the said Power Company, plaintiff in this action, free and clear of encumbrances upon the receipt by it of the three hundred thousand dollars par value of five per cent first mortgage bonds and five hundred thousand dollars of the par value of the stock of the said Power Company."

269 The contention of the plaintiff in this connection is that the Carolina Construction Corporation assumed the contract that had been made between Ketcham & Company and Ambursen Hydraulic Construction Company; that the Carolina Construction Corporation took over the surveys that had been made by Verdell for the Ambursen Hydraulic Construction Company, and that the survey made by Verdell became a part of the contract entered into between Ketcham & Company and the Carolina Construction Corporation and the plaintiff in this action.

The defendant contends that this water power proposition was owned originally by George E. Smith in the years 1909, 1907 and 1908; that it was sold by Smith to Ketcham & Company, a corporation, and by Ketcham & Company to the Carolina Construction Corporation. That the plaintiff never having been the owner of this water power proposition could not take any legal corporate action to adopt any lands on the river. The defendant contends that the action that was taken relative to these locations was taken by the owner of them; that is, by the Carolina Construction Corporation. That a survey was made by Verdell for the Ambursen Hydraulic Construction Company under contract between the Ambursen Company and the Construction Company, and that it was not made

directly for the plaintiff. That all lands purchased were purchased by the Construction Corporation, and title to them put in the name of the plaintiff by the Construction Corporation in accordance with the terms of a contract between the Construction Corporation and the plaintiff.

The defendant further contends that the survey, that is the maps of the Construction Company, were never transferred to or accepted by the plaintiff. That the deeds taken reciting the location of a dam site was not a corporate action on the part of the plaintiff since the plaintiff did not take corporate action; that the deeds covered property bought by the Construction Company and title thereto was placed in the name of the Power Company under the contract between the two Companies. That the contract for lands named for either alleged dam site were taken by Smith whose rights went into the Construction Company, and were therefore, acts not of the power company, but of the Construction Corporation. That the authorization of Smith to purchase the lands was an authorization either by or for the benefit of the Construction Corporation and not of the plaintiff. That the plaintiff by no resolution or acceptance or acts on its part ever adopted the locations contended for on the Hiawassee River before the organization of the defendant company in July 1914. Now, these are the contentions of the defendant upon this issue.

In respect to the contentions of the plaintiff on the one hand, of the defendant on the other, the Court charges you as follows:

If you find by the greater weight of the evidence that the plaintiff, Carolina-Tennessee Power Company, on the 25th day of May 1909, and on the 28th day of May 1909, duly passed and adopted the resolutions offered in the evidence, dated on said days, and entered into a contract for the building of the dams and constructing of the public works, which contract was offered in evidence, and that said dams and public works were to be constructed at a dam site near Appalachia and the other at a dam site near Beaverdam Creek, you are then to consider said acts as circumstances tending to show that the plaintiff adopted said locations for its dams and public works, as alleged in the complaint. If you find by the greater weight of the evidence that the Carolina-Tennessee Power Company, the plaintiff, through its stockholders, on the 25th day of May 1909, and through its Board of Directors on the 28th day of May 1909, decided and determined to build the dams and public works as alleged in the complaint, you will then answer the second issue "yes."

The plaintiff contends that it was chartered by the General Assembly of North Carolina by an Act passed in 1909; that it was organized May 25th, 1909, and that a board of directors was elected; that the stockholders by a proper resolution passed on said day duly authorized the board of directors to enter into a contract for building the dams and constructing the public works mentioned in the complaint; that on the 28th day of May 1909, the Board of Directors of the plaintiff Company passed a resolution authorizing its officers to enter into a contract for the building of dams and public works, as

alleged in the complaint. That thereafter the contract was duly made and entered into by which it was provided, among other things, that the Carolina Construction Corporation should acquire the necessary real estate for such dams, reservoirs and public works, and cause the title thereto to be vested in the plaintiff Company, and would also construct such dams and public works and equip the same, as alleged in the complaint; that said dams were to be erected, one near Appalachia and the other near Beaverdam Creek, as alleged in the complaint; that at one or more meetings of the board of directors of the plaintiff Company, the said directors had before them the surveys, maps and plats of the locations of such dams, reservoirs and public works mentioned in the complaint, and adopted said surveys, maps and plats of said locations and developments, and decided and determined to go ahead and acquire all of the necessary lands and to make said developments. That the plaintiff thereafter took the deeds for some of the lands necessary for its proposed public works, and took options or contracts for other lands during the years 1910 and 1911, and made payments for said lands in the years 1910, 1911 and 1912, and that the payments on the proposed developments at

272 said dam amounted in all to more than \$90,000.00, and that prior to the organization of the Hiawassee River Power Company, the defendant, in July 1914, the plaintiff had acquired about eighteen miles of river front necessary for its dams, reservoirs and public works, and had in addition thereto about twelve miles of river front under contract and some other land under condemnation proceedings, and that all these acts and things were done with the knowledge and co-operation of the Board of Directors of the plaintiff Company, and that by these and other acts of the plaintiff Company, the plaintiff had adopted the surveys, maps and plats of the locations of its dams, reservoirs and public works, as alleged in the complaint. These are the contentions of the plaintiff.

The Court instructs you that if you find that the plaintiff did the acts and things recited in these contentions, and did by authoritative corporate action adopt the said surveys and locations for its dams, reservoirs and public works, as alleged in the complaint, and so find by the greater weight of the evidence, you will answer the second issue "yes."

If you do not answer the second issue "yes" under the instructions which have been given you, you will answer it "no."

Third. Did the plaintiff prior to the commencement of this action on the 21st day of August 1914, abandon its said locations and proposed plans as alleged in the answer?

The burden of this issue, gentlemen, is upon the defendant. The defendant upon this issue is required to satisfy you by the greater weight of the evidence that the plaintiff did abandon its said locations and plans as alleged. After considering all the evidence in the case, if you are satisfied by its preponderance, its greater weight, that the plaintiff did abandon its location and plans, you will answer

273 the third issue "yes," and if not, you will answer it "no."

Now, upon this issue the defendant contends that you should answer it "yes" for the following alleged reasons:

The defendant contends that you should find from the evidence that the plaintiff Company in the years of 1910, 1911 and 1912 allowed practically all of the options which had been taken by the Construction Company for it under the terms of the contract between the two companies to expire and become null and void, and in this way its right in and to a large part of the river frontage was relinquished and abandoned. The defendant contends that the plaintiff Company after 1912 and in 1913 was insolvent and was unable to carry out any of its contracts or to proceed with any development upon the Hiawassee River; that a Receiver was appointed on account of the debts it had contracted, and because it could not pay these debts, and further on the ground that the contracts were not taken up because the plaintiff had no money. The defendant further contends that plaintiff was insolvent from the day of its organization; that it has issued \$250,000.00 of stock, \$300,000.00 of bonds, and never at any time had assets of over \$52,000.00, which was the purchase price of the lands taken for it by the Construction Company. The defendant contends that in addition to its stocks and bonds, it owed in 1913 to Norvell \$12,000.00, to the Bank of Murphy \$2,000.00, to Witherspoon & Witherspoon \$75.00 and to Bell \$280.00; that it had no funds, could not take up its land contracts, permitted them to expire and become null and void because it had no money with which to pay for the execution of the deeds or to pay the purchase price of the lands. The defendant further contends that the scheme of the plaintiff was speculative entirely, and that the scheme failed for lack of means, and that after this failure the proposition was allowed to remain inert, dead and abandoned, and plaintiff Company had no intention of receiving it for the purposes provided in its charter, and from 1912 until the organization of the Company, abandoned its locations and its plans. All of these contentions on the part of the defendant are contradicted by the plaintiff.

The plaintiff alleges that from the time of the organization of the above corporation until the defendant interfered with its work, it was actively engaged in procuring titles either by purchase or by condemnation, and that it had in fact procured a large part of the property which was necessary to enable it to go forward with the construction of the work which it contemplated; that during the years 1909, 1910, 1911 and 1912, part of 1913 and in 1914 up to the time the present action was instituted against the defendant, it was engaged in an effort to perfect its title to the proposed property, and in good faith intended to construct its public works, to construct and complete its mills, dams, power houses and equip them with machinery, and was prevented from going forward with its work by the interference of the defendant. These, gentlemen, are the contentions of the parties.

Plaintiff further contends in this connection that although the jury may find that a Receiver was appointed, that this is not evidence necessarily either of insolvency or of an intention on the part of the plaintiff to abandon its property, because the plaintiff contends that there is evidence tending to show that for a short period of time, as it contends, it was prevented from getting the money which had been

promised by reason of the failure of one of its banks to provide the money as it had agreed to do, and that a temporary cessation of its work followed.

Now, gentlemen of the jury, what is meant by the word "abandoned" as used in this issue? Did the plaintiff abandon its locations and proposed plans? To abandon a right or to abandon property means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon and the external act by which such intention is carried into effect. There must be a concurrence of the intention to abandon a right or a property with actual relinquishment of it, or giving it up. It is a well settled principle that to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title. Mere lapse of time, mere delay in asserting the claim, a mere period of time during which no work was done, would not be sufficient in itself to constitute an abandonment, unaccompanied by any acts clearly inconsistent with the right.

In this connection I call your attention to another matter. Something has been said in the argument of counsel as to the Acts of the General Assembly of North Carolina for the year 1913, Chapter 133. This Act provides that a water power company such as this shall be required to begin active work in two years after the ratification of this Act and diligently prosecute its work until it shall be completed, and that failure to do so will be legal grounds for the Corporation Commission to recommend that the Attorney General for the State bring a suit to declare its charter forfeited.

The Court charges, gentlemen, that this Act which went into effect in the spring of 1913 does not provide that such failure shall in itself be deemed an abandonment of the property or the rights of the corporation. It merely provides that when, for this length of time, nothing is done, the Corporation Commission of the State may, if it see fit, recommend to the Attorney General that an action be instituted on the part of the State. The effect of the Act is not to constitute a mere lapse in the work an abandonment of its property or of its rights. Plaintiff contends that even if this Act had that effect, that during the year 1914 it was actually actively engaged in procuring titles to the property in question, and that even if the Act so provided, the terms would not reach the plaintiff.

The Court charges, gentlemen, upon these questions that if you find by the greater weight of the evidence that the plaintiff through its duly constituted officers, prior to the commencement of this action, August 21st, 1914, intended to relinquish, to give up its locations and plans for the construction of its water power on the Hiawassee River, and that with such intention there occurred positive and unequivocal external acts and conduct on the part of such officers which were inconsistent with the plaintiff's right and which gave effect to such intention, you will answer the third issue "yes." If you do not so find, you will answer it "no."

Fourth. Did the plaintiff file the maps or plats of its said locations

the office of the Clerk of the Superior Court of Cherokee County or about June 21st, 1911, as alleged in the complaint?

Now, the burden of this issue is upon the plaintiff to satisfy you the greater weight of the evidence that it did file the maps or plats as alleged.

Now, let us see what the contentions of the parties are with respect to this matter. In the charter of the plaintiff Company, which has been introduced in evidence, is this clause: "When the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the County in which the said land lies, then it shall be lawful for the said Company to condemn the land," and so on, and further on in section 8 follows this language: "And provided further that such locating of said works and filing its surveys in the office of the clerk of the Superior Court shall not preclude said Company from making, from time to time, other location of works and filing surveys of the same as its business and its development require."

The plaintiff contends that the two maps referred to as Exhibits No. 7 and 7-A were filed by the plaintiff in the office of the Clerk at the time contended by the plaintiff. That there is evidence tending to show that E. B. Norvell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, on June 21st, 1911, carried these maps to the office of the Clerk and told the Clerk that they wished to deposit the maps as provided by the plaintiff's charter; that it was necessary to do so to enable the plaintiff to condemn land for the purposes of its contemplated work; that they left these maps with the Clerk during office hours for that purpose, and that they were taken out about a week later by permission of the Clerk, kept for two to six days and returned, and were again taken out or borrowed and returned in July, 1914.

The contention of the defendant is that the charter of the plaintiff required that it file these maps in the office of the Clerk; that the plaintiff has not contended that it filed the maps, but only that it deposited them with the Clerk; that in the complaint filed by the plaintiff is used the word "deposited" instead of "filed"; that there is no allegation in the complaint that the maps were filed; that in the evidence of the witnesses, Norvell and Smith, it is stated that the maps were deposited with the Clerk, and that the witness, Norvell, insists in his evidence that they were deposited because the word "deposited" was the word used in the charter. The defendant further contends that the evidence of Fain, Clerk, and the Deputy Clerk show that the maps were never filed; that the maps were not marked either by the Clerk or by the Deputy. The defendant further contends that the filing of the maps was a prerequisite of the right of the plaintiff Company to locate a dam site, and even if the testimony of the plaintiff be accepted as true, defendant contends that there was no legal filing of the maps as contended by the plaintiff.

It is further insisted by the defendant that under the plaintiff's evidence the maps were deposited June 21st, 1911, and were allowed to remain with the Clerk only from two to six days, and were after-

ward taken out and kept until July, 1914, and this would not constitute a filing; also that the purpose of the filing of a paper of the character is to make it a public record and to make it permanent and that a temporary deposit with the Clerk where a paper is withdrawn in a few days would neither make a permanent record nor a public record. The defendant then contends that these maps having been taken out and carried to the office of the witness, Norvell, as attorney for plaintiff, were not in fact or in law filed in contemplation of the charter.

Plaintiff has introduced in evidence certain letters, or a certain letter written by George E. Smith to Ketcham & Company stating that these maps first would be filed by him, and another letter stating that the maps had been filed by him in the office of the Clerk and that the maps were in fact found in the office of the Clerk during the month of April, 1915.

Now, what is meant by the word "filing?" What is necessary in order to constitute the filing of a paper? We are told that this word "filed" is derived from a word which means thread or wire, the idea being that a paper which was filed was originally put upon a string or wire for safe-keeping. The word used in the charter is the word "deposit." A paper may be said to be filed in an office when it is delivered at the proper office to the proper officer and is by him received to be kept on file where such papers are usually kept. In the absence of statutory provision or other requirements of the law, it is not necessary ordinarily for the officer to write the word "filed" on the papers. The appearance of the word "filed" on a paper

279 or its non-appearance, is a circumstance which the jury may consider in passing upon the question whether the paper was in fact filed, but it is not necessary as a matter of law that the officer should write upon the paper the word "filed" in order to constitute such filing.

If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County by E. B. Norvell, attorney for plaintiff, and George E. Smith, Vice President of the plaintiff Company, or either of them for and on behalf of the plaintiff during office hours on or about June 21st, 1911, and were there delivered to the Clerk and the Clerk was then and there informed that the maps were placed in his custody under the terms of plaintiff's charter and that this was necessary in order to enable the plaintiff to condemn land under the charter and the Clerk received the maps in his official custody to be kept on file in the office and that Norvell and Smith, or either of them, in good faith left the papers there to be kept on file as a record of the office, you will then answer the fourth issue "yes," although you may further find from the evidence that the word "filed" was not in fact endorsed upon the map by the Clerk. Unless you answer this issue "yes" under the instructions, you will answer it "no."

Fifth. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs and public works which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint? This issue is answered "yes" by consent.

Sixth. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River as alleged in the answer? This issue is answered "yes" by consent. I have written the answer to the fifth and sixth issue as a matter of convenience to the jury.

Seventh. If so, did the defendant by authoritative corporate action adopt said locations, and if so, when? The burden of this issue is upon the defendant to satisfy you by the greater weight of the evidence that these locations were adopted by authoritative corporate action on the part of the defendant, and also the date of such adoption. The defendant has introduced in evidence a deed from Van Deventer to the defendant purporting to convey all his interests in the contract of sale executed to him. As to this issue, gentlemen, the defendant Company contends that it gave \$98,000.00 capital stock to Van Deventer for the lands which Van Deventer had bought and for the surveys he had made and for the report of Chapman and Lenz which Van Deventer had caused to be made; that Van Deventer had himself located the two dam sites at Shoal Creek and at Coleman and everything that Van Deventer had done was transferred to the defendant. The defendant contends that the survey made by McLelland showed these two dam sites and that this map was bought by the defendant Company. That the report of Chapman showing the survey of these two dam sites was bought by the defendant Company from Van Deventer; that the report of Lenz as to these two dam sites was comprehensive and comprehended all questions, geographical, topographical and hydraulic in connection with the two dams. That this report of Lenz furnished full data as to the cost of construction of two dams, the power houses and transmission lines and the cost of the property necessary for reservoirs and other information necessary to erect and complete the plans at the two dam sites. Defendant contends that this report of Lenz further comprehended markets at which the power from these two dam sites could be sold, and this report of Lenz was sold by Van Deventer to the Company; that McLelland had surveyed in connection with this development a railroad from Turtletown to the two dam sites, and this was sold by Van Deventer to the defendant Company; that all these surveys, maps and reports were accepted by the Company and bought by the Company; that in this acceptance the Company approved of the two dam sites located by the defendant at Coleman and Shoal Creek. That after the Company authorized condemnation proceedings to be brought for certain property in the reservoirs to be used in connection with these dam sites, that thereafter the Company by resolution instructed the drilling of the dam site by the Sullivan Machinery Company; that the dam site at Shoal Creek was actually in process of being drilled at the time this suit was filed. That all of these acts show acceptance on the part of the Company of these two dam sites and acceptance in the law, the defendant contends, is adoption, and that all these acts show that the defendant by authority of corporate action adopted these locations. The defendant contends that these locations were adopted on July 15th, 1914, at the meeting of the stockholders and directors of the

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defendant Company, and that this was the authoritative corporate action which was necessary and which was exercised.

The plaintiff denies, gentlemen, that there is any evidence which is sufficient to justify the jury in finding that the defendant Company at any time adopted the locations referred to in the Chapman or Mullens or McLelland survey. The plaintiff contends that in the proceedings of the stockholders' meeting or the incorporators' meeting introduced by the defendant Company there is no evidence of any corporate action adopting these lands.

The Court charges that the mere fact, if you find it to be a fact from the evidence, that the maps referred to had been made and were

in the possession of the defendant and were accepted, would not in itself necessarily imply the adoption of these maps. It

would be a circumstance for the jury to consider. In order to present the question, it is necessary to refer you to the minutes of the stockholders on that occasion. Now, this is the entry in the minutes introduced in evidence by the defendant, which are dated, "July 15th, 1914, Murphy, North Carolina." A meeting of the subscribers to the capital stock of the Hiawassee River Power Company was held at Murphy, North Carolina, in the office of Dillard & Hill and Axley on the above date. Now, omitting some matters, that are not particularly pertinent, the following entry appears: "The subscribers then considered the charter and on motion duly seconded, the same was accepted by unanimous vote." Hugh F. Van Deventer then tendered the corporation a deed conveying to it in fee simple all the lands situate on the Hiawassee River in Cherokee County which are necessary for the purposes of the Company and to which he had theretofore acquired title, and all his right, title and interest in and to certain other lands so situate and so necessary for the purpose of said Company which he had theretofore acquired by virtue of certain written contracts and all maps, surveys and engineers' reports and so on which he had prepared in payment for his subscription to the capital stock of the corporation. On motion of John E. Fain, duly seconded, it was voted unanimously by all the subscribers, except H. F. Van Deventer, to accept said locations, maps, surveys, engineers' report and so on in payment for 980 shares of the capital stock, and it was the unanimous vote of the stockholders that they were well and fully worth the sum of \$98,000.00; that J. E. Fain and P. E. Nelson owned stock of the value of \$1,000.00 each, being ten shares at \$100.00 each which was paid in in cash.

Plaintiff contends that there is no record in this meeting of the adoption of the location referred to in the surveys and the maps, but that the entry merely shows that the maps and surveys as turned over by Van Deventer were accepted by the defendant Company. The defendant contends that the acceptance of the maps and surveys implies the acceptance of the locations. The entry in the minutes, you will observe, is in substance that such lands, maps, surveys and engineer's reports were accepted by the incorporators. If you find from the evidence that Van Deventer executed a deed to the defendant, and tendered to the defendant or the incorporators as part of the agreement between them, the maps and surveys referred to in the sixth issue, and that the incorporators of

the defendant then had before them these maps, surveys and reports and had knowledge of the location represented by the surveys and maps, and it was then understood and intended by the incorporators that the work which the defendant proposed to do in developing the water power on the Hiawassee River should be prosecuted at the places and in the manner and to the extent represented in these surveys and maps, and that the incorporators in good faith intended and purposed to complete the work as represented by the surveys and maps, you may consider these circumstances as evidence in passing upon the question whether the incorporators of the defendant Company received and accepted the locations represented by these maps and surveys as their own locations, and if you find from the evidence that the incorporators did receive and accept these locations as their own locations or the locations of the defendant Company, you will then find that they adopted these locations within the meaning of this issue, then your answer will be "yes." If you do not so find, you will answer it "no."

Now, gentlemen, as stated, the first issue, the fifth issue and the sixth issue are answered "yes" by consent. You are to answer the second, third, fourth and seventh, and in doing so, as I have indicated, you are to be guided entirely, exclusively, absolutely by the law and the evidence.

The Court, after setting out in its charge, the province of the judge and the jury respectively in the trial of a case, in stating the contentions of the parties, charged the jury as follows:

"The plaintiff contends that it had the land which it purposed to acquire, surveyed and defined, before similar action was taken by the defendant, and thereby acquired the first and better right to this property."

To this part of his Honor's charge, the defendant excepted; same being Defendant's Exception No. 13.

The Court, after charging the jury relative to the plaintiff's contentions and the defendant's contentions, relative to surveying and defining the property which it purposed to acquire for water power development, charged the jury as follows

"In this connection, it may be well to direct your attention to this proposition of law: In case of a contest between two corporations, which are engaged in a public utility, and are clothed with practically the same power of condemnation, the first location belongs to that company which first defines and marks its route, and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the Company."

To this part of his Honor's charge, the defendant excepted; the same being Defendant's Exception No. 14.

The Court charged the jury as follows:

"There is another principle; where a priority of right has been secured by priority of location, such prior right cannot be defeated by a rival company agreeing with the owners, and purchasing the property; nor can it be defeated by condemnation; that is to say, if one rival company surveys, defines, marks and

adopts the location of property which it purposes to acquire for purposes of public utility, another company cannot occupy the same territory, and defeat the claim of the first by condemnation or purchase."

To this part of his Honor's charge, the defendant excepted; same being Defendant's Exception No. 15.

The Court then charged the jury:

"One phase of the controversy in this action depends on your answer to the question: Which of the parties to this action acquired the first and better right? The plain ~~or~~ contends that, as early as 1900 it had surveyed the property which it purposed to acquire, and adopted the location made by the surveyors, as represented on a large plat."

To this part of His Honor's charge the defendant excepted; same being Defendant's Exception No. 16.

The Court, after charging the jury relative to the contentions respectively of the plaintiff and the defendant, covering the second issue as to whether the plaintiff in the year 1909, or thereafter, before the organization of the defendant company in July, 1909, adopted its alleged dam location by authoritative corporate action, alleged in the complaint, charged the jury as follows:

"In respect to the contentions of the plaintiff on the one hand and of the defendant on the other, the Court charges you as follows: If you find by the greater weight of the evidence that the plaintiff, the Carolina-Tennessee Power Company, on the 25th day of May, 1909, and on the 28th day of May, 1909, did pass and adopted resolutions offered in the evidence, dated on said days, and entered into a contract for the building of dams and the construction of public works, which contract was offered in evidence and that said dams and public works were to be constructed one at a dam site near Appalachia, and the other at a dam site near Bear Creek, you are then to consider said acts as circumstances tending to show that the plaintiff adopted said locations for its dams and public works, as alleged in the complaint. If you find by the greater weight of the evidence, that the Carolina-Tennessee Power Company, the plaintiff, through its stock-holders, on the 25th day of May, 1909, and through its Board of Directors on the 28th day of May, 1909, decided and determined to build the dams and public works as alleged in the complaint, you will then answer the second issue "yes."

To this portion of his Honor's charge the defendant excepted; same being Defendant's Exception No. 17.

The Court then charged the jury on this issue, as follows:

"The plaintiff contends that it was chartered by the General Assembly of North Carolina, by an Act passed in 1909; that it was organized May 25th, 1909, and that a Board of Directors was elected by the stock-holders, and that a proper resolution was passed on said day duly authorizing the Board of Directors to enter into a contract for building the dams and constructing the public works mentioned in the complaint; that, on the 28th day of May, 1909, the Board of Directors of the plaintiff Company passed a resolution, and

thorizing its officers to enter into a contract for the building of dams and public works, as alleged in the complaint; that thereafter, the contract was made and duly entered into by which it was provided, among other things, that the Carolina Construction Corporation should acquire the necessary real estate for such dams, reservoirs and public works, and cause the title thereto to be vested in the plaintiff Company, and would also construct such dams and public works, and equip the same, as alleged in the complaint; that said dams were to be erected, one near Appalachia and the other near Beaver Dam Creek, as alleged in the complaint; that at one or more meetings of the Board of Directors, of the plaintiff Company, the said Directors had before them the surveys, maps and plats of the locations of such dams, reservoirs and public works, mentioned in the complaint, and adopted said surveys, maps and plats of said locations and developments, and decided and determined to go ahead and acquire all of the necessary lands, and make such developments; that the plaintiff thereafter took the deeds for some of the lands necessary for its proposed public works, and took options on tracts of other lands, during the years 1910 and 1911, and made payments for said lands in the years 1910, 1911, and 1912, and that the payments on the proposed developments at said dams, amounted in all more than ninety thousand dollars; and that, prior to the organization of The Hiawassee River Power Company, the defendant, in July, 1914, the plaintiff had acquired about eighteen miles of river front necessary for its dams, reservoirs and public works, and had, in addition thereto, about twelve miles of river front under contract, and some other land under condemnation proceedings; and that all those acts and things were done with the knowledge and cooperation of the Board of Directors of the plaintiff Company; and that, by those and other acts of the plaintiff Company, the plaintiff had adopted the surveys, maps and plats of the locations of its dams, reservoirs and public works, as alleged in the complaint. These were the contentions of the plaintiff. The Court instructs you that, if you find that the plaintiff did the acts and things cited in these contentions, and did by authoritative corporate action, adopt said surveys and locations for its dams, reservoirs and public works, as alleged in the complaint, and so find by the greater weight of the evidence, you will answer the second issue: Yes. If you do not answer the second issue yes, under the instructions which have been given you, you will answer it: No."

To this portion of his Honor's charge, the defendant excepted; the same being Defendant's Exception No. 18.

The Court then proceeded to charge the jury upon the third issue submitted, covering the question as to whether the plaintiff, prior to the commencement of this action, on the 21st day of August, 1914, had abandoned its said location and proposed plans, as alleged in the answer. As to this issue, the Court put the burden of proof as to the alleged abandonment, upon the defendant, and, after charging the contentions of the defendant upon this issue, charged as follows:

"The plaintiff alleges that, from the time of the organization of the above corporation, until the defendant interfered with its work, it

was actively engaged in procuring titles, either by purchase or condemnation, and that it had in fact procured a large part of property which was necessary to enable it to go forward with the construction of the work which it contemplated; that, during years 1909, 1910, 1911, 1912, and part of 1913, and in 1914, up to the time the present action was instituted against the defendant, was engaged in an effort to perfect its title to the proposed property and in good faith intended to construct its public works, and
 289 to construct and build its mills, dams and power houses, and equip them with machinery, and was prevented from going forward with this work by the interference of the defendant."

To this portion of his Honor's charge, the defendant excepted, the same being Defendant's Exception No. 19.

The Court further charged the jury, upon this issue of abandonment, as follows:

"Now, Gentlemen of the Jury, what is meant by the word 'abandonment,' as used in this issue? Did the plaintiff abandon its location and proposed plans? To abandon a right, or to abandon property, means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon, and an external act by which such intention is carried into effect. There must be a concurrence of intention to abandon a right to property, with actual relinquishment of it, or giving it up. It is a well settled principle that, to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title; mere lapse of time, mere delay in asserting a claim, or a mere period of time during which no work was done, would not be sufficient, in itself, to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right."

To this portion of his Honor's charge, the defendant excepted, the same being Defendant's Exception No. 20.

The Court further charged the jury, on this issue of abandonment, as follows:

"The Court charges you, gentlemen, upon these questions, that, if you find by the greater weight of the evidence, that the plaintiff, through its duly constituted officers, prior to the commencement of this action, August 21st, 1914, intended to relinquish, to give up its locations and plans for the construction of its water power on the Hiawassee River, and that, with such intention, there concurred positive and unequivocal external acts and conduct on the part of such officers, which were inconsistent with the plaintiff's rights, and which gave effect to such intentions, you will answer the third issue: Yes. If you do not so find, you will answer it: No."

To this portion of his Honor's charge, the defendant excepted, the same being Defendant's Exception No. 21.

The Court then proceeded to charge the jury upon the fourth issue, covering the question as to whether the plaintiff filed maps and plats of its locations in the office of the Clerk of the Superior Court of Cherokee County, on or about June 21st, 1911, as alleged in the

complaint. In charging upon the contentions of the parties relative to this issue, the Court charged as follows:

"The plaintiff contends that the two maps referred to as Exhibits No. 7 and No. 7-A, were filed by the plaintiff in the office of the Clerk at the time contended by the plaintiff, that there is evidence tending to show that E. B. Norvell, Attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, on June 21st, 1911, carried these maps to the office of the Clerk, and told the Clerk that they wished to deposit the maps, as provided by the plaintiff's charter, that it was necessary to do so to enable the plaintiff to condemn the land for the purposes of its contemplated work; that they left these maps with the Clerk during office hours, for that purpose, and that they were taken out about a week later, by permission of the Clerk, and kept from two to six days, and were returned, and were again taken out, or borrowed, and returned, in July, 1914."

To this portion of his Honor's charge, the defendant excepted; the same being Defendant's Exception No. 22.

The Court next charged the contentions of the defendant relative to this issue, embracing the filing of these maps, and, after instructing the jury as to the meaning of the word "filing," charged the jury as follows:

"If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County, by E. B. Norvell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, or either of them, for and on behalf of the plaintiff, during office hours, on or about June 21st, 1911, and were there delivered to the Clerk, and the Clerk was then informed that the maps were placed in his custody under the terms of the plaintiff's charter, that this was necessary in order to enable the plaintiff to condemn land under the charter, and the Clerk received the maps in his official custody, to be kept on file in the office, and that Norvell and Smith, or either of them, in good faith left the papers there to be kept on file as a record of the office, you will then answer the fourth issue: Yes—although you may further find from the evidence that the word "filed" was not in fact endorsed upon the maps by the Clerk. Unless you answer this issue, 'Yes,' under the instructions, you will answer it: 'No.'"

To this portion of his Honor's charge, the defendant excepted; the same being Defendant's Exception No. 23.

The Court, in its charge upon the seventh issue, embracing the question as to whether the defendant, by authoritative corporate action, adopted the locations of its dams and reservoirs claimed by it, after placing the burden of this issue upon the defendant, and after stating the contentions of the defendant and the plaintiff upon this issue, charged the jury as follows:

"The Court charges you that the mere fact, if you find it to be the fact from the evidence, that the maps referred to had been made, and were in the possession of the defendant, and were accepted, would not, in itself, necessarily imply the adoption of these maps; it would be a circumstance for the jury to consider. In order to

present the question, it is necessary to refer you to the minutes of the stockholders on that occasion. Now, this is the entry in the minutes introduced in evidence by the defendant, which is dated July 15th, 1914:

"Murphy, N. C. A meeting of the subscribers to the capital stock of The Hiawassee River Power Company was held at Murphy in the office of Dillard & Hill & Axley, on the above date.' Now omitting some matters that are not particularly pertinent, the following entry appears; 'The subscribers then considered the charter and on motion, duly seconded, the same was adopted by unanimous vote. Hugh F. Vandeventer then tendered the corporation a deed conveying to it in fee simple, all the lands situated on the Hiawassee River in Cherokee County, which are necessary for the purpose of the Company, to which he had theretofore acquired title, and all his right, title and interest in and to certain other lands so situated and so necessary for the purpose of said Company, which he had theretofore acquired by virtue of certain written contracts; and all maps, surveys and engineer's reports, and so on, which he had prepared, in payment for his subscription to the capital stock of the corporation. On motion of John E. Fain, duly seconded,

293 was voted unanimously by all the subscribers except H. F.

Vandeventer, to accept said locations, maps, surveys, engineer's reports, and so on, in payment for 980 shares of the capital stock, and it was the unanimous vote of the stockholders that they were well and fully worth the sum of \$98,000; and that J. E. Fain and P. E. Nelson owned stock of the value of \$1,000 each, being ten shares at \$100 each, which was paid in in cash.' The plaintiff contends that there is no record in this meeting of the adoption of the locations referred to in the surveys and maps, but that the entry merely shows that the maps and surveys, as turned over by Vandeventer, were accepted by the defendant Company. The defendant contends that the acceptance of maps and surveys implies the acceptance of the locations, but the entry in the minutes, you will observe, is in substance that such lands, maps, surveys and engineers' reports, were accepted by the incorporators. If you find from the evidence that Vandeventer executed the deed to the defendant and tendered to the defendant, or the incorporators, as a part of the agreement between them, the maps and surveys referred to in the sixth issue, and that the incorporators of the defendant then had before them these maps, surveys and reports, and had knowledge of the locations represented by the surveys and maps, and it was then understood and intended by the incorporators that the work which the defendant proposed to do in developing the water power on the Hiawassee River should be prosecuted at the places and in the manner and to the extent represented in those surveys and maps, and that the incorporators in good faith intended and proposed to complete the work as represented by the surveys and maps, you may consider these circumstances as evidence in passing upon the question of whether the incorporators of the defendant Company received and accepted the locations represented by those maps

and surveys as their own locations, and if you find from the evidence that the incorporators did receive and accept these locations as their own locations, or the locations of the defendant company, you will then find that it adopted these locations, within the meaning of this issue, then your answer will be: Yes. If you do not so find, you will answer it: No."

To this portion of his Honor's charge, the defendant excepted; the same being Defendant's Exception No. 24.

After the charge of the Court, the jury retired, and returned the verdict set out in the record. The defendant then moved to set aside the verdict of the jury, and for a new trial. The motion was overruled, and the defendant excepted; the same being Defendant's Exception No. 25.

The Court then signed the judgment set out in the record; to which judgment the defendant excepted, and appealed to the Supreme Court; the same being Defendant's Exception No. 26.

Notice of appeal was given in open Court, further notice was waived, the appeal bond was fixed at One Hundred Dollars. The defendant was allowed sixty days in which to serve a statement of the case on appeal, and the plaintiff sixty days after such service, to file exceptions, or serve counter-case. By agreements and stipulations of counsel, incorporated into the record, the defendant was allowed until July 31st, 1917, in which to serve a statement of the case on appeal, and the plaintiff ninety days after such service to file exceptions, or serve counter-case.

This July 28th, 1917.

J. N. MOODY,
FELIX ALLEY,
DILLARD & HILL,
ZEBULON WEAVER,
McDANIEL & BLACK,

*Attorneys for Hiawassee River Power Co.,
Defendant, Appellant.*

It is agreed that the foregoing statement of case on appeal is correct.

This September 21st, 1917.

MARTIN, ROLLINS & WRIGHT,
Of Counsel for Plaintiff.

J. N. MOODY,
FELIX ALLEY,
DILLARD & HILL,
ZEBULON WEAVER,
McDANIEL & BLACK,

Counsel for Defendant.

Assignments of Error.

NORTH CAROLINA,
Cherokee County:

Superior Court, April Term, 1917.

(Title of Cause.)

In the above entitled cause, the defendant assigns errors as follows:

1st. That the Court erred in admitting in evidence, over the defendant's objection, the charter of the Carolina-Tennessee Power Company; which charter is set out as "Plaintiff's Exhibit No. 296 1," hereto, and as set out in Defendant's Exception No. 1.

2d. That the Court erred in admitting in evidence, over the defendant's objection, the evidence of the witness Ketcham, as follows:

"Q. Now, Mr. Ketcham, did you at any time direct any person connected with the Company to dispose of these maps, or copies of these maps? A. I did." Defendant here inquired as to whether such instructions were in writing, and the witness Ketcham answered: "Yes, I wrote to the representative here." Defendant objected to this evidence, as the writing was the best evidence of what it contained.

"Q. Have you the letter? A. No; I haven't it with me. Q. Mr. Ketcham, did you give any instructions to an officer or representative of the Carolina-Tennessee Power Company in regard to those maps? A. Yes sir. Q. To whom did you give the directions? A. George E. Smith. Q. What was his connection with the Power Company? A. Vice-President. Q. What were these instructions? Were these instructions in writing? A. The instructions were to file them with the Clerk of the Court. Q. At what place? A. At Murphy."

To this evidence the defendant objected, on the ground that, the instructions being in writing, the writing would be the best evidence of its contents; all as set out in Defendant's Exception No. 2.

3d. That the Court erred in admitting, over defendant's objection, the following evidence of the witness Powellson, as set out in Defendant's Exception No. 3:

"Q. Now, Mr. Powellson, after you decided to take an interest in this proposition, and after you purchased the stocks and bonds, what has been your intention in regard to the matter?" The defendant objects. (By the Court): "You may state whether or not you took

297 charge of it in good faith, for the purpose of executing the objects of the corporation." A. Yes sir. Q. Please state

whether or not you took charge of it in good faith, for the purpose of developing this water power? A. I went into this proposition, and put money into it, in good faith, for the purpose of bringing about the development of the Hiawassee River for power purposes between the State line and the mouth of Hangingdog Creek for the development of electrical power purposes."

To this evidence, the defendant objected, upon the ground that the intention of this witness, who is a stockholder in the plaintiff corporation, was not material; the true question being as to what was the purpose of the corporation, and that this was to be gathered by what was done by the corporation, through its acts, and that the intention and purpose of an individual stockholder was not pertinent, relevant or competent; all being included in Defendant's Exception No. 3.

4th. That the Court erred, upon the conclusion of all of the evidence, both for the plaintiff and the defendant, in refusing to sustain the motion of the defendant for non-suit upon demurrer to the evidence; which said demurrer and motion was renewed at the close of all the evidence, as set out in Defendant's Exception- No. 4 and 12.

5th. That the Court erred in refusing to admit in evidence Defendant's Exhibit No. 29; the same being a deed dated July 3d, 1915, by and between Hugh Rogers and his wife, Elizabeth Rogers, and the Hiawassee River Power Company, conveying the land described in the deed for a consideration of three thousand dollars, with the usual warranties; the deed being registered in Book No. 29 of Deeds, on Page 430, on July 9th, 1915. To the introduction of this deed, the plaintiff objected, upon the ground that the deed was executed and the alleged consideration therein mentioned, if paid

at all, was paid after the bringing of this action. Upon this objection, the Court ruled that this suit was begun August 21st, 1914, and the deed offered in evidence was executed July 3d, 1915, after the commencement of the suit, and the objection of the plaintiff upon this ground was sustained. This deed was offered to show the jury the situation of the parties at the time of the trial of this suit, as to the ownership of lands adjoining the banks of the Hiawassee River, in order that the existing rights of the parties relative to the properties upon the banks of the Hiawassee River at the date of the trial might be determined; and second, to illustrate the defendant's good faith in this matter, and its continuing purpose to carry out the plans and purposes of its organization, and to show that the defendant Company complied with all of the contracts of purchase and sale of properties upon the Hiawassee River, which it had made with the owners of such properties, and which contracts had been introduced in evidence. This deed was excluded by the Court upon the sole ground that it was made and executed after the filing of the petition in this action, and the commencement of this action; and to this ruling of the Court the defendant excepted; all as shown in its Exception No. 5.

6th. That the Court erred in excluding from the evidence the following deeds:

Deed from Hugh Rogers and wife to The Hiawassee River Power Company, dated July 3d, 1915, and recorded August 9th, 1915, in Book No. 29 of Deeds, Page 340.

Deed from E. E. Stiles and wife, Myrtle Station, to The Hiawassee River Power Company, dated June 2d, 1915, recorded in Book 29 of Deeds, page 296, June 2d, 1915.

Deed from W. P. James and Lola Hartness James, Guardian, to The Hiawassee River Power Company, dated January 13th, 1917,

and recorded in Book of Deeds No. 67, page 476, on January 20th, 1917.

299 Deed from W. H. Hyatt and wife, Mary Hyatt, to the Hiawassee River Power Company, dated March 10th, 1916, and recorded in Book No. 67 of Deeds, page 10, on March 17th, 1916.

Deed from W. A. Mashburn and wife, to The Hiawassee River Power Company, dated November 16th, 1914, recorded in Book No. 29, on Page 30, on December 2d, 1914.

Deed of Mary Rogers et al., to The Hiawassee River Power Company, dated July 3d, 1915, and recorded in Book No. 29, page 351, July 20th, 1915.

Deed from O. F. Hunsucker and wife to Hiawassee River Power Company, dated September 1st, 1915, recorded in Book 29, page 408, September 1st, 1915.

Deed from Julius Reed and wife, Martha Reed, to Hiawassee River Power Company, dated April 5th, 1915, and recorded in Book 29, page 245, April 23d, 1915.

Deed from Joseph L. Whitener and wife to Hiawassee River Power Company, dated May 27th, 1916, and recorded in Book 67, page 156, May 27th, 1916.

Deed from E. H. Nelson and wife to Hiawassee River Power Company, dated April 3d, 1915, and recorded April 21st, 1915, in Book No. 29, page 243.

Deed from H. T. Hamby and others to Hiawassee River Power Company, dated January 10th, 1917, recorded in Book No. 67, page 477, January 22d, 1917.

Deed W. A. Fair and wife to Hiawassee River Power Company, dated April 25th, 1916, and recorded in Book 67, page 113, April 26th, 1916.

Deed Q. W. Stiles and wife to Hiawassee River Power Company, dated September 2d, 1915, and recorded in Book 29, page 411, September 3, 1915.

Deed W. H. Johnson and wife to Hiawassee River Power Company, dated January 18, 1916, and recorded in Book No. 65, page 600, January 27, 1916.

300 Deed W. S. Roberts and wife to Hiawassee River Power Company, dated July 3d, 1916, and recorded in Book 67, page 215, July 7th, 1916.

Deed from W. M. Cooper and T. J. Cooper, Executors, to the Hiawassee River Power Company, dated December —, 1914, recorded in Book No. 29, page 81, January 11th, 1915.

Deed Lon Raper and wife to Hiawassee River Power Company, dated December 7th, 1914, and recorded in Book 29, page 84, January 11th, 1915.

Deed Lon Raper and wife, and T. M. Raper, to Hiawassee River Power Company dated 28th of December, 1916, and recorded in Book 67 of Deeds, page 436, January 2d, 1917.

Deed from J. H. Martin and wife, to Hiawassee River Power Company, dated March 29, 1915, recorded in Book 29, page 242, April 21, 1915.

Deed G. W. Hartness and wife, to Hiawassee River Power Com-

pany, dated February 12, 1917, and recorded in Book 67, page 515, February 15, 1917.

Deed W. J. Crain and others to Hiawassee River Power Company, dated the 10th day of July, 1915, and registered in Book 29, page 346, July 14, 1915.

Deed W. J. Crain, Guardian, to Hiawassee River Power Company, dated July 10, 1915, and recorded in Book 29 page 347, July 14, 1915.

Deed W. J. Crain, S. A. Crain and others to the Hiawassee River Power Company, dated July 3d, 1915, and recorded in Book 29, page 348, July 14, 1915.

Deed Jacob Davis and wife to Hiawassee River Power Company, dated September 1st, 1915, recorded in Book No. 29, page 409, September 1st, 1915.

Deed W. K. Johnson and wife to Hiawassee River Power Company, dated January 27, 1917, and recorded April 5, 1917, in Book 69, page 8.

Deed W. B. Raper to Hiawassee River Power Company, dated December 11, 1914, and recorded in Book No. 29, page 82, July 11, 1915.

Deed W. B. Raper and wife, et al., to the Hiawassee River Power Company dated December 21, 1916, and recorded in Book 67, page 428, December 27, 1916.

Contract of sale made by W. H. Reece and wife to the Hiawassee River Power Company, dated the 31st day of December, 1914, conveying certain lands consisting of two tracts along the Hiawassee River, which are described in the contract of sale; the purchase price agreed upon being \$2,100.00, \$700.00 of which sum is recited as paid, and the balance is payable as shown in the contract; this contract recorded in Book No. 29, page 61, December 10th, 1914.

These deeds were all introduced for the purpose of showing the situation of the parties at the time of the trial of this equitable cause, as illustrating their relative rights in and to lands and water powers upon the Hiawassee River, and as illustrating the good faith of the defendant in its purposes, and in order to show that all contracts upon which these deeds were based had been carried out by the defendant; which contracts had been subsequently introduced in evidence. To the introduction of this evidence, the plaintiff objected, upon the ground that the deeds offered in evidence were made, executed and delivered after the filing of the petition and the commencement of this action, and upon this ground solely the deeds were excluded by the Court. To this ruling of the Court, the defendant excepted, and upon this ruling assigned error; all as shown in Defendant's Exception No. 6.

7th. That the Court erred in excluding the evidence offered of the witness Vandeventer that, on all the contracts for land, which contracts had been offered in evidence in this case, and which contracts were made prior to the bringing of this suit, and which contracts called for payments after the filing of this suit, all such payments had been made as they fell due. To this evidence, the plaintiff objected upon the ground that such payments had been

made after the institution of this action. In offering this evidence, the defendant stated that it was offered for the purpose of showing the situation of the parties relative to their respective rights in and to the water powers upon this River at the date of the trial of this action, and to show the good faith of the defendant in its purposes. The objection of the plaintiff was sustained, and the defendant excepted; all as shown in Defendant's Exception No. 7.

8th. That the Court erred in refusing to allow the witness Vandeventer to answer the following questions: "Mr. Vandeventer, as an officer of the corporation, if you are allowed to do so, will you carry out this proposition, and build these dams?" All as shown in Defendant's Exception No. 8.

9th. That the Court erred in excluding the following evidence of the witness McMullen:

"Q. State whether or not you ever requested your attorney, Mr. Maloney, to see if he could find a map of the Carolina-Tennessee Company property? A. I did, would be my answer.

"Q. State what, if any, report he made to you? A. He reported he could find no map of theirs on file."

To this question and answer plaintiff objected on the ground that the attorney's report was hearsay. This objection was sustained and the evidence excluded. To this ruling of the Court the defendant excepted and assigned error, all as shown in Defendant's Exception No. 9.

10th. That the Court erred in excluding the following evidence of the witness McMullen: "Q. State whether or not the parties from

whom you took these options alleged to have been covered by

303 deeds or options to the Carolina-Tennessee Power Company did not tell you that default had been made in the payments according to the terms of the option? A. You mean these options that I took? Q. Yes, the options that you took? A. In every instance they told me that. I did not take them unless they did so.

Q. State whether the parties from whom you took options alleged to have been covered by options to the Carolina-Tennessee Power Company told you that the options had expired or run out? A. They did." To these questions and answers the plaintiff objected and the evidence was excluded. To this ruling of the Court the defendant excepted and assigned error, all as shown by Defendant's Exception No. 10.

11th. That the Court erred in admitting the evidence of the witness Geo. E. Smith as follows: "Q. What was your purpose or what was your purpose as an officer of the Carolina-Tennessee Power Company during your connection with that corporation and during the year that you were here looking after its interest?"

To this question, the defendant objected upon the ground that the evidence sought was irrelevant and incompetent; the true question being what was the purpose of the corporation. This objection of the defendant was overruled; the Court instructing the jury that the testimony of the witness was to be considered only so far as it might tend to show the purpose of the witness as an officer of the plaintiff corporation, and was to be considered only as a circumstance tending

to show the purpose of the plaintiff corporation in the actions, in respect to the matter referred to. The answer to this question was as follows: "To place our securities and build a dam, to build the dams as contemplated on the Hiawassee River." To the allowance of this question and answer, the defendant excepted; all as shown in Defendant's Exception No. 11.

13th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 13, the same being as follows: "The plaintiff contends that it had the land which it purposed to acquire, surveyed and defined, before similar action was taken by the defendant, and thereby acquired the first and better right to this property."

14th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 14, the same being as follows: "In this connection, it may be well to direct your attention to this proposition of law: In case of a contest between two corporations, which are engaged in a public utility, and are clothed with practically the same power of condemnation, the first location belongs to that Company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the Company."

15th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 15, the same being as follows: "There is another principle; where a priority of right has been secured by priority of location, such prior right cannot be defeated by a rival Company agreeing with the owners and purchasing the property; nor can it be defeated by condemnation; that is to say, if one rival Company surveys, defines, marks and adopts the location of property which it purposes to acquire for purposes of public utility, another Company cannot occupy the same territory, and defeat the claims of the first by condemnation or by purchase."

16th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 16, the same being as follows: "One phase of the controversy in this action depends on your answer to the question: Which of the parties to this action acquired the first and better right? The plaintiff contends that as early as 1909 it had surveyed the property which it purposed to acquire and adopted the location made by the surveyors as represented on the large plat.

17th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 17, the same being as follows: "In respect to the contentions of the plaintiff on the one hand, and of the defendant on the other, the Court charges you as follows: If you find by the greater weight of the evidence that the plaintiff, the Carolina-Tennessee Power Company, on the 25th day of May 1909, and on the 28th day of May 1909, duly passed and adopted resolutions offered in the evidence, dated on said days, and entered into a contract for the building of

dams and the construction of public works, which contract was offered in evidence, and that said dams and public works were to be constructed one at a dam site near Appalachia, and the other at a dam site near Beaverdam Creek, you are then to consider said acts as circumstances tending to show that the plaintiff adopted said location for its dams and public works, as alleged in the complaint. If you find by the greater weight of the evidence that the Carolina Tennessee Power Company, the plaintiff, through its stockholders on the 25th day of May 1909, and through its Board of Directors on the 28th day of May 1909, decided and determined to build the dams and public works as alleged in the complaint, you will answer the second issue "yes."

18th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 18, the same being as follows: "The plaintiff com-

tends that it was chartered by the General Assembly of North Carolina, by an Act passed in 1909; that it was organized May 25th 1909, and that a Board of Directors was elected by the stockholders and that a proper resolution was passed on said date duly authorizing the Board of Directors to enter into a contract for building the dams and constructing the public works mentioned in the complaint; that on the 28th day of May 1909 the Board of Directors of the plaintiff Company passed a resolution authorizing its officers to enter into a contract for the building of dams and public works as alleged in the complaint; that thereafter the contract was made and duly entered into by which it was provided, among other things, that the Carolina Construction Corporation should acquire the necessary real estate for such dams, reservoirs and public works and cause the title thereto to be vested in the plaintiff Company, and would also construct such dams and public works and equip the same, as alleged in the complaint; that said dams were to be erected one near Appalachia and the other near Beaverdam Creek, as alleged in the complaint; that at one or more meetings of the Board of Directors of the plaintiff Company the said directors had before them the surveys, maps and plats of the locations of such dams, reservoirs and public works mentioned in the complaint, and adopted said surveys, maps and plats of said locations and developments, and decided and determined to go ahead and acquire all the necessary lands and make such development; that the plaintiff thereafter took the deeds for some of the lands necessary for its proposed public works and took options on tracts of other land during the years 1910 and 1911, and made payments for said land in the years 1910, 1911 and 1912, and that the payments on the proposed developments at said dams

amounted in all to more than \$90,000.00; and that prior to the organization of the Hiawassee River Power Company, the defendant, in July, 1914, the plaintiff acquired about eighteen miles of river front necessary for its dams, reservoirs and public works, and had, in addition thereto, about 12 miles of river front under contract and some other land under condemnation proceedings; and that all those acts and things were done with the knowledge and co-operation of the Board of Directors of the plaintiff

Company; and that by those and other acts of the plaintiff Company the plaintiff had adopted the surveys, maps and plats of the locations of its dams, reservoirs and public works, as alleged in the complaint. These were the contentions of the plaintiff. The Court instructs you that if you find that the plaintiff did the acts and things recited in the contentions and did by authoritative corporate action adopt said surveys and locations for its dams, reservoirs and public works, as alleged in the complaint, and so find by the greater weight of the evidence, you will answer the second issue "Yes." If you do not answer the second issue "yes" under the instructions which have been given you, you will answer it "No."

19th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 19, the same being as follows: "The plaintiff alleges that from the time of the organization of the above corporation until the defendant interfered with its work it was actively engaged in procuring titles, either by purchase or by condemnation, and that it had in fact procured a large part of the property which was necessary to enable it to go forward with the construction of the work which it contemplated; that, during the years 1909, 1910, 1911, 1912 and part of 1913, and in 1914, up to the time the present action was instituted against the defendant, it was engaged in an effort to perfect its title to the proposed property, and in good faith intended to construct its public works and to construct and build its mills, dams and power houses and equip them with machinery, and was prevented from going forward with this work by the interference of the defendant.

20th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 20, the same being as follows: "Now, gentlemen of the jury, what is meant by the word 'abandonment,' as used in this issue? Did the plaintiff abandon its locations and proposed plans? To abandon a right or to abandon property means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon and an external act by which such intention is carried into effect. There must be a concurrence of intention to abandon a right to property with actual relinquishment of it or giving it up. It is a well settled principle that to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title; mere lapse of time, mere delay in asserting a claim or a mere period of time during which no work was done, would not be sufficient in itself to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right."

21st. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 21, the same being as follows: "The Court charges you, gentlemen, upon these questions, that if you find by the greater weight of the evidence that the plaintiff, through its duly constituted officers, prior to the commencement of this action, Aug. 21st, 1914, intended

to relinquish, to give up its location and plans for the construction of its water power on the Hiawassee River and that, with such intention, there concurred positive and unequivocal external acts and conduct on the part of such officers which were inconsistent with the plaintiff's rights and which gave effect to such intention you will answer the third issue 'Yes.' If you do not so find you will answer it 'No.' "

22nd. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 22, the same being as follows: "The plaintiff contends that the two maps referred to as exhibits No. 7 and No. 7-A were filed by the plaintiff in the office of the Clerk at the time contended by the plaintiff; that there is evidence tending to show that E. B. Norvell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, on June 21st, 1911, carried these maps to the office of the Clerk and told the Clerk that they wished to deposit the maps as provided by the plaintiff's charter, that it was necessary to do so to enable the plaintiff to condemn the land for the purpose of its contemplated works, that they left these maps with the clerk during office hours for that purpose, and that they were taken out about a week later by permission of the clerk and kept from two to six days and were returned and were again taken out or borrowed and returned in July 1914."

23rd. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 23, the same being as follows: "If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County by E. B. Norvell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, or either of them, for and on behalf of the plaintiff during office hours, on or about June 21st, 1911, and were there delivered to the Clerk and the Clerk was then and there informed that the maps were placed in his custody under the terms of the plaintiff's charter that this was necessary in order to enable the plaintiff to condemn land under the charter, and the clerk received the maps in his official

310 custody to be kept on file in the office, and that Norvell and Smith, or either of them, in good faith left the papers there to be kept on file as a record of the office, you will then answer the fourth issue "Yes," although you may further find from the evidence that the word "filed" was not, in fact, endorsed upon the maps by the Clerk. Unless you answer this issue "yes" under the instructions, you will answer it "No."

24th. That the Court erred in its charge to the jury and particularly in that portion thereof set out in defendant's exception No. 24, the same being as follows: "The Court charges you that the mere fact, if you find it to be the fact from the evidence, that the maps referred to had been made and were in the possession of the defendant and were accepted, would not in itself necessarily imply the adoption of these maps. It would be a circumstance for the jury to consider. In order to present the question, it is necessary to refer you to the minutes of the stockholders on that occasion. Nor

this is the entry in the minutes introduced in evidence by the defendant which is dated July 15th, 1914: 'Murphy, N. C. A meeting of the subscribers to the capital stock of the Hiawassee River Power Company was held at Murphy in the office of Dillard, Hill & Axley on the above date.' Now, omitting some matters that are not particularly pertinent, the following entry appears: "The subscribers then considered the charter and on motion, duly seconded, the same was adopted by a unanimous vote. Hugh F. Vandeventer then tendered the corporation a deed co-veying to it in fee simple all the lands situated on the Hiawassee River in Cherokee County which are necessary for the purposes of the Company to which he had theretofore acquired title and all his right, title and interest in and to certain other lands so situated and so necessary for the purposes of said Company which he had theretofore acquired by virtue of certain written contracts; and all maps, surveys and engineer's reports and so on which he had prepared, in payment for his subscription to the capital stock of the corporation. On motion of John E. Fain, duly seconded, it was voted unanimously by all the subscribers except H. F. Vandeventer, to accept said locations, maps, surveys, engineer's reports and so on in payment for 980 shares of the capital stock, and it was the unanimous vote of the stockholders that they were well and fully worth the sum of \$98,000.00; and that J. E. Fain and P. E. Nelson owned stock of the value of \$1,000.00 each, being ten shares at \$100.00 each which was paid in in cash.' The plaintiff contends that there is no record in this meeting of the adoption of the locations referred to in the surveys and maps, but that the entry merely shows that the maps and surveys, as turned over by Vandeventer, were accepted by the defendant Company. The defendant contends that the acceptance of maps and surveys implies the acceptance of the locations, but the entry in the minutes, you will observe, is in substance that such lands, maps, surveys and engineer's reports were accepted by the incorporators. If you find from the evidence that Vandeventer executed a deed to the defendant and tendered to the defendant or the incorporators as a part of the agreement between them, the maps and surveys referred to in the sixth issue, and that the incorporators of the defendant then had before them these maps, surveys and reports and had knowledge of the locations represented by the surveys and maps and it was then understood and intended by the incorporators that the work which the defendant proposed to do in developing the water power on the Hiawassee River should be prosecuted at the places and in the manner and to the extent represented in those surveys and maps and that the incorporators, in good faith, intended and proposed to complete the work, as represented by the surveys and maps, you may consider these circumstances as evidence in passing upon the question of whether the incorporators of the defendant Company received and accepted the locations represented by those maps and surveys as their own locations, and if you find from the evidence that the incorporators did receive and accept these locations as their own locations or the locations of the defendant Company, you will then find that it

adopted these locations within the meaning of this issue. The your answer will be "Yes." If you do not so find, you will answer it "No."

25th. That the Court erred in refusing to grant the defendant's motion to set aside the verdict of the jury and for a new trial, as set forth in defendant's exception No. 25.

26th. That the Court erred in signing and granting the judgment set out in the record as set forth in defendant's exception No. 26.

This July 28th, 1917.

J. N. MOODY,
FELIX ALLEY,
DILLARD & HILL,
ZEBULON WEAVER,
McDANIEL & BLACK,

*Attorneys for Hiawassee River Power Co.,
Defendant-Appellant.*

Due and legal service of the foregoing statement of case on appeal and of assignments of errors acknowledged, copy received. All other and further service waived. Service made within time stipulated and agreed.

This July 28th, 1917.

M. W. BELL,
E. B. NORVELL,
MARTIN, ROLLINS & WRIGHT,
Attorneys for Plaintiff, Appellant.

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Plaintiff's Exhibit No. 1.

An Act to Incorporate the Carolina-Tennessee Power Company.

The General Assembly of North Carolina do enact:

Section 1. That Stanley R. Ketcham, Wm. F. Cox, Wm. L. Church, Elton F. Smith and George E. Smith, and their associates and successors and assigns, be and they are hereby declared a body politic and corporate, under the name and style of Carolina-Tennessee Power Company, and by that name shall have succession for a period of sixty years, sue and be sued, plead and be impleaded, make and use a corporate seal and alter the same at pleasure, contract and be contracted with, and shall have and enjoy all the rights and privileges necessary for the purpose of this Act.

Sec. 2. The objects for which said corporation is established are: To supply light, heat and power, electrical, steam or otherwise, to individuals and corporations, private or municipal; to construct, maintain and operate railroads, railways, flumes, telegraph and telephone lines, or other means of transportation or communication; to encourage, promote, operate and maintain manufacturing enterprises, mines, mineral substances, hotels, industries and businesses of any kind whatsoever, and works of internal improvement or public

of utility, and generally to develop in every way the resources of any and all land and other business enterprises acquired by the said corporation, or belonging to others.

Sec. 3. That said corporation shall have power and authority to acquire by purchase, or otherwise, lands, tenements and rights-of-way, in any extent, and hold same in fee simple, or by less estate, and dispose of same at pleasure; and to engage generally in any and all kinds of business or operations not unlawful, considerable and desirable or advantageous to be engaged in or carried on in connection with the improvements and development of any such lands, or other enterprises.

Sec. 4. That said corporation shall also have power to acquire by purchase or otherwise, any and all personal property it may desire, including the right to acquire, own, hold, sell and dispose of the stocks, bonds and other securities of other corporations, and also the power to purchase, lease, or otherwise acquire, and to hold, sell and dispose of the property or properties of other corporations, and to operate the same with all the rights and privileges of the corporations whose property or properties have been so acquired.

Sec. 5. That said corporation shall have the following power:

(a) To supply to the public, including both individuals and corporations, whether private or municipal, within the State of North Carolina and elsewhere, power in the form of electric current, hydraulic, pneumatic and steam pressure, or any of the said forms, or in any other form, for use in driving machinery, and for light, heat and all other uses to which the power so supplied can be applied, and to charge, collect and receive payments therefor; and for the purpose of enabling the Company to supply power as aforesaid, the company is authorized and empowered to erect, build and maintain any dam, or dams, flume or flumes, ditch or ditches, and to buy or otherwise acquire, generate, develop, store, use, transmit and distribute power of all kinds, and to locate, acquire, construct, equip, maintain and operate lines for the transmission of power by wires, poles, or underground, and by cables, pipes, tubes, conduits and all other convenient appliances for power transmission, including railroads or railways, with such connecting and branch lines within the State of North Carolina or elsewhere as the Board of Directors may locate or authorize to be located, for receiving, transmitting and distributing power, and to acquire, own, hold, sell or otherwise dispose of water power and water privileges within the State of North Carolina, and locate, acquire, conduct, equip, maintain and operate all necessary plants for generating and developing by water, steam or by any other means, and for storing, using, transmitting, distributing, selling and delivering power, including dams, gates, bridges, sluices, tunnels, stations and other buildings, and all other works, structures, machinery and appliances which may be necessary to the operation of said plants. Provided, that the lines and appurtenances hereinbefore authorized for distributing power and light, are to be constructed, when on public streets or highways in any county, city or town, under such reasonable regulations as

the authorities respectively thereof shall, upon application from the Company, prescribe.

(b) To carry on and conduct the business of generating, making transmitting, furnishing and selling steam and electricity for the purposes of lighting, heat and power, and transmission of power and to furnish and sell, and to contract for the furnishing and sale to persons, corporations, counties, towns and cities, of steam or electricity for illuminating purposes, or as motive power for running and propelling motor cars, machinery and apparatus, and also for all other uses and purposes for which electricity or steam is now or may be hereafter used; to construct, maintain and operate a plant or plants for manufacturing, generating and transmitting steam and electricity; to deal in, generate, furnish, supply and sell electricity, steam, gas, compressed air, and all other kinds of powers, forces, fluids, currents, matter and material used or to be used for the purpose of illumination, heat and power; to carry on any and all business in any wise appertaining or connected with the manufacturing and

generating, distributing and furnishing of electricity, compressed air, gas, or steam for light, heat and power purposes including the transacting and conducting of any and all business in which electricity, compressed air, gas or steam is now or may be hereafter utilized, and all matters incidental or necessary to the distribution of light, heat and power; to manufacture and repair, sell and deal in any and all necessary appliances and machinery used, or which may be acquired or deemed advisable for or in connection with the utilizing of electricity, compressed air, gas or steam, or in any wise appertaining thereto or connected therewith; to purchase, acquire, own, use, lease, let and furnish any and all kinds of machinery, apparatus and appliances; to purchase, acquire, own, hold, improve, let, lease, operate and maintain water rights and privileges and water powers; to construct, acquire, build and operate, maintain and lease dams, canals, ditches, flumes and pipe lines for the conducting of water, and creating power.

(c) To build, construct, maintain and operate railroads or railways, street railways, motor lines, tramways, turnpikes, flumes, lakes and canals, and to carry freight and passengers thereon, and to charge, collect and receive tolls or fares for the same; to construct, build, purchase, buy, own, hold, lease, maintain and operate telegraph and telephone lines and railroads or railways wherever it may deem expedient, and to charge, receive and collect such charges and rates for the carrying of passengers and freight over its railroads or railways, or street railways or motor lines, tramways, turnpikes, flumes, lakes or canals, and for the use of its telegraph or telephone lines for the transmission of messages thereon as it may deem reasonable, and not contrary to the laws of North Carolina; to construct, acquire, own, hold, lease, maintain and operate lines of wires, underground, conduit, subways or other convenient conduits or

316 appliances for the transmission of electricity and other energies, steam, fluids, forces and currents, as may be deemed advisable or expedient; to lease any part or all of its railroads or railways, street railways, motor lines, tramways, turnpikes, flumes

lakes, canals, telegraph lines, telephone lines, power transmission lines, conduits and power plants and all other property to any other company or companies organized for the purpose of maintaining and operating such roads, lines, lakes, canals, conduits or power plants and lines, and to lease, purchase, maintain and operate any part or all of any other railroad, telegraph or telephone lines, conduits or power plants, constructed by others, upon such terms and conditions as may be agreed upon by the parties respectively; to apply to the proper authorities of any county, city or town in the State of North Carolina or elsewhere, in which the railroads or railways, street railways, motor lines, tramways, turnpikes, flumes, canals, lakes, power transmission lines, power plants, underground subways, wires, poles and appliances of this corporation may extend, or be designed or intended now or hereafter to extend, for the grant of any rights, powers, privileges and franchises for the maintenance and operation thereof; to accept, receive, own, hold and lease all and singular the rights of the same; to acquire by contract, purchase, lease or otherwise, and to accept, own, and hold any right, privileges or franchises heretofore granted to any person, firm, company or corporation, or which may be hereafter so granted by the proper authorities of any such county, city or town; and to do and perform all matters and things necessary, proper or convenient for the accomplishment of the objects hereinbefore mentioned.

(d) To acquire by purchase, condemnation or other proper methods, the right to use, employ and divert the water flowing and running in any stream or water course, not navigable in North Carolina, which may be necessary to the exercise of any of the powers of a public or quasi public character herein granted to the said corporation; and whenever it shall be necessary to divert the water from any such stream or water course to be used for any of the purposes herein provided, the said corporation shall have the right to have the value of the said water so to be diverted, and the land so to be used over which it shall be banked, ponded or conducted, condemned, and the value thereof assessed in the manner hereinafter provided for the condemnation and valuation of land and other property

(e) To purchase, acquire, rent, lease, own and hold and improve real estate in such quantities as may be deemed expedient, and to build dwelling houses, build and operate stores, mills, including cotton mills, schools, factories, including cotton factories, warehouses, hotels, and any and all other buildings and structures deemed advisable and expedient; to sell and dispose of the same on such terms and conditions and payments, including installments and installment plans as may be desirable or convenient; to lay out and plot any real property belonging to or acquired by the company into lots, blocks, squares, factory sites, and other convenient forms; and to lay out, plot and dedicate to public use or otherwise, streets, avenues, alleys and parks; and to adorn and beautify and use its property by building dams for ponds, reservoirs and lakes, and by other means.

(f) To manufacture, purchase, or otherwise acquire, hold, own, sell, assign and transfer, invest, trade, deal in and deal with goods,

wares and merchandise, and property of every class and description, and do both mining and manufacturing of any kind, including the treatment of ores of any kind, and also to carry on the business of farming, stock raising, lumbering and cutting and dealing in fire wood, quarrying and hotel keeping.

319 (g) To erect and construct, make, improve or aid, or subscribe towards the construction, making and improvement of mills, including cotton mills, factories, including cotton factories, store houses, buildings, roads, docks, piers, walls, houses for employees and others, and works of all kind.

(h) To guarantee the payment of dividends or interest on any shares, stocks, debentures or other securities issued by them in every contract or obligation of any corporation, whenever proper or necessary for the business of this corporation in the judgment of its directors.

(i) To do all and every thing necessary, suitable or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to or expedient for the protection or benefit of the corporation, either as holders of, or interested in, any property, and in general to carry on any business, whether manufacturing, mining or otherwise.

(j) To acquire by original subscription, contract or otherwise, and to hold, manage, pledge, mortgage, sell, convey and dispose of or otherwise deal with, in like manner as individuals may do, shares of the capital stock, notes, bonds and other obligations issued or created by other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could; to lease, purchase or otherwise acquire, own, hold, maintain, use and dispose of the right-of-way, permits, privileges, powers, franchises and property of every kind and nature, real, personal or mixed, of any other corporation, or to unite and consolidate with any other corporation upon such terms as may be agreed upon, and also to borrow money and for such consideration and upon such terms as the stockholders or Board of Directors may determine, 320 mine, and to issue its notes, bonds, and debentures from time to time as they may elect, and to secure the same by mortgage or mortgages on its property, whether it is owned or thereafter to be acquired, and its franchises, in whole or in part, as they may deem necessary or expedient.

Sec. 6. That said corporation shall have power and authority to construct and maintain dams across any stream or streams in North Carolina not declared by law to be navigable, at any point or points, place or places on land, now owned, or hereafter acquired by it in North Carolina or elsewhere by purchase or by condemnation in the manner hereinafter prescribed, and acquire land and water by purchase or condemnation, or other lawful methods, for the purpose of building dams, ponding and storing water to be used either as a water supply, or as a motive power, for any railroad or railways, or street railway or motor line, machinery, power plant, mill, factory

other business the said company may desire to operate, or to supply water or power to individuals or corporations, and of producing power by means of any such dam or dams for sale, and of selling the same, and to that end and for any other purpose, it may install, use and operate any and all machinery considered desirable or necessary. This section shall be considered and construed to authorize the manufacture of electricity or power, and the right to transmit the same to consumers by wires, poles, cables and conduits, or any other approved method of transmission, and the right to condemn land and water for such purposes; also said power may be used by said company for propelling or running its railroads, railways, or street railways, or motor lines, and telephone or telegraph lines, and boats or for any other purpose.

Sec. 7. That any railroad or railroads, railway or railways, street railways or motor lines, and any telephone or telegraph line or lines and any public or quasi public works constructed and operated by this company, shall be considered and governed as other railroads, railways, telegraph lines and telephone lines, and subject to the same laws governing such lines in North Carolina.

Sec. 8. It shall be lawful for the president and directors, their agents, superintendents, engineers and others in their employ, to enter at all times upon all lands or water for the purpose of exploring, surveying the lands and water required by said company for the location of any of its works, or for the conducting of the business, or any part of said business, hereinafter authorized, in paragraphs *a*, *b*, *c*, and *d* of section five, and of locating said works, doing no unnecessary damage to private property; and when the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the county in which the said land lies, then it shall be lawful for the said company, by its officers, agents, engineers, superintendents, contractors and others in its employ, to enter upon, take possession of, have, hold, use and excavate and fill in such lands, and to erect all the necessary and suitable structures for the erection, completion, repairing and operating of said works, subject to such compensation as is hereinafter provided; Provided, however, that said company shall not enter upon or break ground upon the premises, except for the purposes of surveying, without the consent of the owner, until such owner's damages are agreed upon between such owner and said company, or ascertained by the method hereinafter provided, and such damage has been paid to such owner; and provided further, that such locating of works and filing its surveys in the office of the Clerk of the Superior Court shall not preclude said company from making, from time to time, other location of works and filing surveys of the same as its business and its development require; and whenever any land for the location of a dam or dams, lake or lakes, or a canal or canals, or for ponding water, or any other lands or rights-of-way may be required by said company for the purpose of constructing and operating its railroads, or railways, street railways or motor lines, telegraph or telephone lines, or other works, or for the conduct-

ing of the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company at a valuation of three commissioners, or a majority of them, to be appointed by the Clerk of the Superior Court of the county in which the land to be condemned lies, or the Clerk of the adjoining county if the land lies in more than one county.

Sec. 9. That all condemnation proceedings authorized under this charter shall be begun in the county where the land lies, or in case the land lies in more than one county, then in either county, before the Clerk of the Superior Court by having summons issued against the owner or owners of such land and filing a petition before said Clerk. The said petition shall set forth, as near as can be, a description of any land or water desired to be condemned, and state that same is honestly desired in good faith by the company for the use and purpose of its work or works, or enterprise. Said petition shall be verified as pleading in other civil actions. The petitioner shall give bond as in other civil actions for costs. When said petition is filed, the Clerk shall issue summons citing defendants named in the petition to appear before him at his office on a day therein named, not exceeding twenty days thereafter, to answer or demur to said petition, and show cause, if any they can, why the prayer of the petitioner should not be granted; which said summons, together with a copy of the petition, shall be served upon each defendant

323 therein named and if any defendant be a minor, or a person non compos mentis, then upon such person's guardian, if there be any, and if there be no guardian, then the Court shall appoint a guardian ad litem to represent the interests of such parties. Upon the hearing of the petition by the Clerk, he shall appoint three disinterested freeholders as commissioners to assess the valuation of any damages. The said commissioners in making said valuation shall take into consideration the loss or damage which may occur to the owner or owners in consequence of the land or water being acquired by the company, and also take into consideration any benefit or benefits that may accrue to the owner of such land or water by reason of such condemnation or action. The said commissioners shall make their report to the said Clerk in writing within twenty days after receiving notice of their appointment, and shall file their report with the Clerk within that time, using the form, or as near as can be, the form provided under section two thousand five hundred and eighty-six of the Revisal of one thousand nine hundred and five of North Carolina. Before entering upon their duties, said commissioners shall take and subscribe on oath before any one authorized to administer oaths, that they will fairly and impartially appraise the lands or waters mentioned in the petition. If the said owner or owners or the said company do not except to the valuation so reported within ten days after the filing of the report, the said Clerk shall approve and confirm said report, and then, upon payment of such valuation and the costs of the proceedings, the said lands or waters shall vest in and be and become the property of said company for the pur-

poses hereinbefore expressed, and the Clerk shall so order. If either or both of the parties be dissatisfied with such valuation, then either or both parties may, within ten days after the filing of said report file exception thereto (provided the Clerk may give either

324 party ten days more within which to file exceptions), and upon the determination of the same by the Clerk, and upon notice to the other party, either within three days after such determination, may appeal to the Superior Court of the county in which the suit is pending to the next ensuing term thereof; and upon the demand of either party, the said valuation shall be determined by a jury trial. If any such demand is not made, the Judge may hear and determine the matter upon exceptions filed and either party shall have the right to appeal to the Supreme Court as in other civil cases from the judgment of the Superior Court. In case any land so acquired shall be claimed by more than one person, then the amount of the valuation shall be deposited with the Clerk of the Superior Court of the county in which the action is pending, until the true owner or owners of the land or water and the proper person to receive said money can be ascertained by an action or suit, or agreement between such claimants. If the owner or owners of the land or water cannot be found, and the return of the summons so shows, then, it shall be sufficient service upon said owner or owners by publishing notice of the summons, with a statement of the nature of the action, for the space of four weeks in some newspaper published in the county where the suit is pending, and if there be no newspaper published in said county, then in a newspaper published in an adjoining county. Said publication shall only be made after affidavit and order for publication as in other civil actions has been filed with the Clerk. In case there are parties unknown, the Court shall appoint some competent attorney to appear for and protect the rights of any party in interest, who is unknown, or whose residence is unknown and who has not appeared in the proceeding by an attorney or agent, and shall make a reasonable allowance to said attorney for his services, which shall be taxed in the bill of costs. The Court shall also have power at any time to amend any defect or informality in any of the proceedings authorized by this charter as may be necessary or to cause new parties to be added and to direct such further notice to be given to any party in interest as it deems proper; and also to appoint any other commissioner in place of any who shall die, refuse, neglect to serve or be incapable of serving. In all cases of appraisal under this charter where the mode or manner of conducting all or any of the proceedings of the appraisal and the proceedings consequent thereto are not expressly provided for herein, the Court before whom such proceedings may be pending shall have power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this charter. When any proceedings of appraisal shall have been commenced, any change of ownership by voluntary conveyance or transfer of the real estate of any interest therein of the subject matter of the appraisal shall not in any manner affect such proceedings, but the same may be carried on and perfected as if no such convey-

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ance or transfer had been made or attempted to be made. Defective titles may be cured as provided by section two thousand five hundred and ninety-five of the Revisal.

Provided, further, that the right of condemnation herein granted shall not authorize said company to invade or remove the burying ground of any individual without his or her consent. In case of any appeal to the Superior Court from the report of the commissioners, or order of the Clerk, by either the said company or the said owner or owners of the land or water to be condemned, then the said company shall deposit with the Clerk of the Superior Court of the county in which said action is pending the sum named as the valuation of said land and water by the commissioners, and all costs

326 of the proceedings up to the date of the appeal, and thereupon the title to said land or water shall vest in the said company for the purpose or purposes hereinbefore expressed or applied for; and when the valuation of said land shall be finally determined as prescribed by this act, then the sum or sums so deposited with the Clerk, or so much thereof as may be necessary to pay to the land or water owner or owners such valuation of said land or water, with such costs as he or they may recover shall be paid to such land or water owner or owners, and any surplus shall be returned to said company. In case such deposit is not sufficient to pay all such valuation and costs, the Court shall give judgment to said owner or owners for the amount of such deficiency, and such judgment shall be a lien on said land or lands or water, having priority over all other liens placed upon said land or water by said company or its assigns and over any and all conveyances thereof made by said company.

Sec. 10. Where any railroad or railway is constructed by this company under the provisions of this charter, the width of the land condemned for all such railroad or railway shall not be more than one hundred feet, except where there may be a deep cut or deep cuts or high embankments, when it may be of greater width.

Sec. 11. Whenever the track of any railroad or railway constructed by this company shall cross any railroad, railway, highway, turnpike or plank road, such highway, turnpike, or plank road may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plank road desirable, the said company may take such additional land for the construction of such road, highway, turnpike or plank road on such new line as may be deemed requisite by the directors; and upon paying the owners therefor the same, when so taken, shall become a part of such intersecting highway, turnpike or plank road in such manner and

327 by such tenure as the adjacent parts of the same highway, turnpike or plank road may be held for highway purposes.

In the construction of its road beds the said company shall so construct same as not to impede the passage or transportation of persons or property along the same.

Sec. 12. Whenever said company constructs any railroad or railway or street railway or motor line, telephone, telegraph or trans-

mission line or lines, it shall have the right to cross or parallel the track of any other railroad, railway, street railway or motor line.

Sec. 13. In order to prevent the frequent crossing of highways, turnpikes or plank roads, or in cases where it may be necessary to occupy the same, the company may change such rights-of-way so as to avoid such crossings and occupation, and to such point as may be deemed expedient.

Sec. 14. For any injury done to the lands of persons by taking them under the four preceding sections, the value thereof shall be assessed in like manner as is provided hereinbefore for assessing damages to real estate.

Sec. 15. That the capital stock of said company shall be two hundred and fifty thousand dollars (\$250,000) with privileges to increase same from time to time as it may see fit, to five million dollars upon application to the Secretary of State and the payment of all lawful fees and costs required by law. That the par value of each share of stock shall be one hundred dollars; and the directors, with the consent and approval of a majority of the stockholders, or a resolution or resolutions adopted by a majority of the stockholders, may receive cash, labor, material, bonds, stocks, contracts, real or personal property, in payment of subscription to the capital stock, and may make such subscription payable in such manner and amounts and at such times as may be agreed upon with the subscribers, and the value placed upon such labor, material, bonds,

328 stocks, contracts, real or personal property in payment of subscriptions to the capital stock when placed or fixed by a majority of the directors shall in the absence of fraud or collusion, be conclusive of the same; and whenever one hundred shares shall have been subscribed, the subscribers, under the direction of the majority of the incorporators herein named, who themselves shall be subscribers, may organize the said company by electing a board of directors, and provide for the election of such other officers and the adoption of such by-laws as may be necessary for the management of the business affairs of said company, and thereupon they shall have and exercise all the powers and functions of a corporation under this charter and the laws of this State. Every subscriber to or holder of stock in said company shall be liable for the debts of the said company to an amount equal to the — unpaid on the stock subscribed for and held by him and no more.

Sec. 16. That until the said corporation shall have fully organized, the incorporators hereinbefore named shall have full and complete charge, control and management of its affairs and operations.

Sec. 17. That the principal place of business of said corporation shall be at Murphy, in the County of Cherokee, State of North Carolina, but branch offices may be established at any other places the corporation may desire, either in or out of the State, and it may do business in any other state. Said corporation may also hold any meetings of its stockholders or directors either within or outside the State of North Carolina. Provided, this act shall not apply to the County of Swain.

Sec. 18. This act shall be in force from and after its ratification.

329 In the General Assembly read three times and ratified, this the 16th day of February, A. D. 1909.

(Signed)

W. C. NEWLAND,

President of the Senate.

(Signed)

A. W. GRAHAM,

Speaker of the House of Representatives.

Plaintiff's Exhibit No. 2.

Certificate of Incorporation of Carolina Construction Corporation.

We, the undersigned, all being citizens of full age, at least two-thirds being citizens of the United States, and at least one a resident of New York State desiring to form a corporation, pursuant to the provisions of The Business Corporation Law of the State of New York, do hereby make, sign, acknowledge and file the certificate for that purpose as follows:

First. The name of this corporation shall be Carolina Construction Company.

Second. The purposes for which this corporation is formed are: To enter into any contract for constructing and equipping any water power, electric power, railroad, or any other public or private works or improvements; to purchase, hold, manage, improve, mortgage, lease, sell, or exchange or otherwise acquire or dispose of real estate or any other public or private works or improvements; to purchase, acquire, hold, sell, assign and transfer the stocks, bonds, mortgages, debentures, notes, contracts, or other evidence of indebtedness of any individual, co-partnership or corporation, and while the holder or owner thereof to possess and exercise in respect thereto all the rights, powers and privileges of individuals, holders or owners thereof; to

330 enter into any contract and make any guarantee respecting dividends, stocks, bonds, contracts and other obligations so far as the same may be permitted by the laws of the State of New York; to make any contract with any person, co-partnership or corporation to accomplish any of the above objects; to conduct any of its business outside of the State of New York and for that purpose to have one or more offices outside of the State of New York; to do any or all of the acts or things aforesaid in its own behalf or in behalf of or as agent for any other individual, co-partnership or corporation; to borrow such moneys as may be necessary for the purpose of its business and pledge any or all of its property as security therefor, and to issue its stock, bonds or other evidence of indebtedness in doing any of its said business or acquiring any of said property.

Third. The amount of the capital stock of this corporation is to be Fifty Thousand Dollars (\$50,000.00).

Fourth. The number of shares of the capital stock of this corporation shall be Five Hundred of the par value of One Hundred Dollars per share, and the amount of capital with which this corporation will begin business shall be Ten Thousand Dollars (\$10,000.00).

Fifth. The location of the principal office of this corporation will

be in the Borough of Manhattan, in the City, County and State of New York.

Sixth. The duration of this corporation will be One Hundred Years.

Seventh. The number of directors of this corporation will be five.

Eighth. The names and postoffice addresses of the directors are as follows:

William F. Cox, 601 West 110th Street, New York City.

Stanley R. Ketcham, 628 W. 114th Street, New York City.

331 George Lester Lewis, 27 William Street, New York City.

Fred'k H. Branstater, 528 W. 145th Street, New York City.

Worthington C. Harper, 519 W. 121st Street, New York City.

Ninth. The names and postoffice addresses of the subscribers hereto and the number of shares of capital stock each agree to take in this corporation are as follows:

William F. Cox, 610 West 110th Street, New York City, 25 shares.

Stanley R. Ketcham, 628 W. 114th Street, New York City, 25 shares.

George Lester Lewis, 27 William Street, New York City, 15 shares.

Fred'k H. Branstater, 528 W. 145th Street, New York City, 15 shares.

Worthington C. Harper, 519 W. 21st Street, New York City, 30 shares.

Tenth. The directors of this corporation need not be stockholders and any or all of them may be removed and others elected in their stead at any meeting of stockholders regularly called for that purpose, or at any meeting held at any time at which all of the directors shall vote in favor of such removal and election.

In witness whereof, we have made, signed and acknowledged this certificate in duplicate this 28th day of April, one thousand nine hundred and nine.

WILLIAM F. COX.

STANLEY R. KETCHAM.

GEORGE LESTER LEWIS.

332 STATE OF NEW YORK.

County of New York,

New York City, ss:

On this 28th day of April, 1909, before me the subscribers personally appeared the above named William F. Cox, Stanley R. Ketcham, and George Lester Lewis, to me known to be the individuals described in and who executed the foregoing certificate of incorporation, and who severally acknowledged that they executed the same.

F. H. BRANSTATER,

Notary Public.

STATE OF NEW YORK,

Office of Secretary of State, ss:

I have compared the preceding with the original certificate of Incorporation of Carolina Construction Corporation, filed and recorded in this office on the 4th day of May, 1909, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and the seal of office of the Secretary of State at the City of Albany, this third day of April, one thousand nine hundred and fifteen.

[Seal of Secretary of State.]

C. W. TAFT,

Second Deputy Secretary of State.

Plaintiff's Exhibit No. 3.

First Meeting of the Incorporators Carolina-Tennessee Power Company.

First meeting of the incorporators of Carolina-Tennessee Power Company, held in the City of Murphy, County of Cherokee, North Carolina, at the office of Edmund B. Norvell, the 25th day of May, 1909.

333 There were present Messrs. George E. Smith, Elton F. Smith, and Stanley R. Ketcham, three of the incorporators named in the Act of Incorporation.

The meeting being called to order on motion duly seconded, Mr. George E. Smith was elected as Chairman of the meeting and Mr. Stanley R. Ketcham as Secretary thereof.

The charter of the Carolina-Tennessee Power Company granted by the Legislature of the State of North Carolina the 16th day of February, 1909, having been read, was, on motion, duly accepted.

By-laws for the management and control of this Company were presented, discussed and, on motion duly seconded, adopted as follows:

Article VIII.

Fiscal Year.

Section 1. The fiscal year of the Company shall begin on the first day of January and shall end on the thirty-first day of December.

Article IX.

Seal.

Section 1. The corporate seal is, and until otherwise ordered by the board of directors shall be circular in form and shall bear the words "Carolina-Tennessee Power Company, North Carolina, 1909."

Article X.

Amendments.

Section 1. These by-laws or any of them may be altered, amended, extended or repealed at any meeting of the stockholders by the vote of a majority of the stockholders present.

Subscriptions to the capital stock showing subscriptions to the amount of Ten Thousand Dollars (\$10,000.00), namely, 334 twenty-five (25) shares by Stanley R. Ketcham, twenty-five shares by William F. Cox; twenty shares (20) by William L. Church, fifteen (15) shares by George E. Smith and fifteen (15) shares by Elton F. Smith, duly executed were received and filed.

It was moved, seconded and carried that George E. Smith, William L. Church, Stanley R. Ketcham, Elton F. Smith and William F. Cox, the incorporators named in the Act of Incorporation, be elected Directors of the Company for the ensuing year.

On motion duly seconded, Mr. William L. Church was elected President of the Corporation, Messrs. William F. Cox, and George E. Smith were elected first and second Vice Presidents, and Mr. Stanley R. Ketcham was elected Secretary and Treasurer. Mr. George Lester Lewis being present and presenting duly executed proxies from Messrs. William F. Cox and William L. Church voted at subsequent proceedings.

On motion duly made and seconded, it was

Resolved, that the capital stock of the corporation be increased from Two Hundred and Fifty Thousand Dollars (\$250,000.00) as provided for in the Act of Incorporation, to the sum of Five Million Dollars (\$5,000,000.00), to consist of fifty thousand shares of the par value of One Hundred Dollars (\$100.00) each, all of the incorporators and stockholders of the corporation voting in favor thereof. And the officers of the Company were directed to execute and acknowledge the necessary certificates of such increase and have the same filed and recorded in the proper offices.

Whereas it is necessary that this Company should borrow money for the purpose of purchasing, building, completing, extending and improving its plant and in order to carry out and complete its plans and purposes as authorized by its charter and franchises in addition to the amount realized and to be realized from the sale 335 of its capital stock; now, on motion duly seconded, it is unanimously

Resolved, that, for the purpose above recited, this Company shall issue its five per cent fifty-year gold bonds to be dated April 1st, 1909, for Five Million Dollars (\$5,000,000.00) with coupons attached, payable semi-annually; and that, for the purpose of securing the payment of said bonds and coupons, it shall execute and deliver to The Standard Trust Company of New York, as Trustee, a mortgage or deed of trust upon all its real estate, rights, privileges and other personal property, and that the officers of this company be authorized to arrange the terms and conditions of such bonds and

mortgage and to execute and deliver the same and affix the seal thereto.

Whereas this corporation was formed among other things for the purpose of acquiring water power and electric plants, developing and equipping the same; and

Whereas the Carolina Construction Corporation (A New York State Corporation), is the owner of a water proposition upon the Hiawassee River, in the County of Cherokee, North Carolina, and is willing to and desirous of disposing of the same to this corporation, and has also proposed to this corporation that it will erect such dams, power houses and buildings as may be necessary to develop the said water power proposition and will acquire and convey to this corporation all of the lands necessary for such development, and will install electrical and other apparatus necessary to provide a complete operating plant, in consideration of the issue and delivery to it of bonds of this corporation and Four Million Nine Hundred and Ninety Thousand Dollars (\$4,990,000) of the capital stock; and
336 whereas it is considered to the best interests of the corporation to accept such proposition, which has been submitted to this meeting in the form of a proposed contract.

It is now Unanimously Resolved, that the directors of this corporation are authorized to enter into an agreement with the Carolina Construction Corporation to do work proposed in such agreement for and in consideration of the issue and delivery to it of the bonds and stock in said contract provided and to issue and deliver the stock and bonds to said Carolina Construction Corporation as in said contract provided.

No other business coming before the meeting, it was, on motion, adjourned.

STANLEY R. KETCHAM, *Secretary*.

Plaintiff's Exhibit No. 4.

Directors' Meeting, 5-28-09.

The first meeting of the directors of the Carolina-Tennessee Power Company was duly called and held at the office of the Company in the City of New York, on the 28th day of May, 1909.

Present: Messrs. William F. Cox, George E. Smith and Stanley R. Ketcham; Messrs. William L. Church and E. F. Smith, directors, not being present.

A Waiver of notice of this meeting and the consent that it be held at the above time and place, executed by all of the directors, was received and ordered filed.

Whereas it is necessary that this Company borrow money for the purpose of purchasing, building, completing, extending and improving its plant and, in order to carry out and complete its plans and purposes as authorized by its charter and franchises, it is necessary to create a bonded indebtedness to the extent of Five Million of Dollars (\$5,000,000.00); and

337 Whereas the stockholders of this Company, at a meeting duly called and held, have authorized the issuance of bonds to secure such indebtedness, and the execution and delivery of a mortgage upon its property and franchises to secure the same;

Now, It is Resolved, that, for the purpose above recited, this Company shall borrow money and to secure same shall issue its five per cent. fifty year gold bonds, with coupons attached, payable semi-annually, to bear date the first day of April, 1909, to the number of five thousand (5,000), numbered consecutively from one (1) to five thousand (5,000), both numbers inclusive, of the denomination of One Thousand Dollars (\$1,000) each, amounting in the aggregate to Five Million of Dollars (\$5,000,000.00), payable both as to principal and interest at the office of the Standard Trust Company of New York to bearer, or in case of registration holder thereof, on the first day of April, 1905, in gold coin of the United States of America; the coupons to be payable in like gold coin at the rate of five per cent. (5%) per annum, semi-annually, at the office of said trustee on the first days of October and April in each year; and

It is further Resolved, that, for the purpose of securing the payment of the said bonds and interests this Company execute and deliver to The Standard Trust Company of New York, as trustee, a mortgage or deed of trust of all real and personal property and franchises of this Company, now owned or which it may hereafter acquire, situated in the State of North Carolina or elsewhere, and the president or vice-president and the secretary or treasurer are authorized to execute in the name of this Company the said mortgage or deed of trust, and deliver the said bonds when as required for the purposes aforesaid and affix the seal of this Company to said bonds and mortgages.

Whereas, the Carolina Construction Corporation is the owner of certain real estate upon the Hiawassee River, in the State of 338 North Carolina, with water power rights and privileges, and proposes to acquire other real estate necessary for the water power and electric development, and to erect thereon certain dams for water reservoir purposes, and to build a power house and equip the same with water and electric apparatus, and do other things necessary to make a complete electric water power plant; and,

Whereas, the stockholders of this corporation have unanimously authorized the directors to execute such a contract and issue the stocks and bonds called for by such contract,

Now, It Is Resolved, that this Company enter into a contract with the Carolina Construction Corporation whereby, in consideration of the issue and delivery to the said Construction Corporation of Two Million Three Hundred Thousand Dollars (\$2,300,000) face value of first mortgage, fifty year 5 per cent bonds of this Company and Four Million Nine Hundred and Ninety Thousand Dollars (\$4,990,000) par value of the stock of this corporation, the said Carolina Construction Corporation agrees to convey to this Company all real estate owned by it on the Hiawassee River, in the State of North Carolina, and to acquire all other real estate that may be necessary

to properly develop the water power plant as proposed, and to erect a dam and power house thereon, and to equip the same with proper water power and electrical apparatus; and, in consideration of the issue to it of an additional Two Million Dollars (\$2,000,000) face value of said first mortgage bonds, the said Carolina Construction Corporation agrees to acquire real estate that may be necessary for a second installation, and to erect a dam thereon, and to equip the same with electrical and water power apparatus whenever it shall be requested to do so by this Company, and the officers of this Company are hereby directed to execute and acknowledge the said contract and to affix the seal of this corporation thereto.

339 Whereas, this corporation has entered into a contract with the Carolina Construction Corporation calling for the immediate delivery to the said Construction Corporation of Two Million Three Hundred Thousand Dollars (\$2,300,000) face value of its first mortgage five per cent, fifty year bonds, secured by a mortgage authorized to be issued to the Standard Trust Company of New York as Trustee.

Now, It Is Resolved, that the officers of this Company are hereby authorized and directed to execute and deliver to the Carolina Construction Corporation Two Million Three Hundred Thousand Dollars (\$2,300,000) face value of the five per cent, first mortgage, fifty year bonds, and to request the Trustee to certify the same, and to give to the said Trustee the authority to the said Trustee for certifying and delivering these same.

Whereas, this corporation has entered into a contract with the Carolina Construction Corporation for the immediate delivery to the said Construction Corporation of Four Million Nine Hundred and Ninety Thousand Dollars (\$4,990,000) par value of the capital stock of this corporation.

Now, it is resolved, that this company issue immediately to the said Carolina Construction Corporation Four Million Nine Hundred and Ninety Thousand Dollars (\$4,990,000) par value of its capital stock and that the officers of the Company issue and deliver the said stock.

On motion, duly made and seconded, it is

Resolved, That George Lester Lewis be and he hereby is appointed the General Counsel of this Company and that Edmund Norvell be and he hereby is appointed the counsel for this Corporation in the State of North Carolina, and that said Norvell be the agent in North Carolina in charge of the office of this corporation and it is further

340 Resolved, That the office of this corporation shall be the office of Edmund B. Norvell, in the City of Murphy, County of Cherokee, North Carolina, until changed by this Board.

No other business coming before the meeting, it was, on motion adjourned.

STANLEY R. KETCHAM, *Secretary*.

Plaintiff's Exhibit No. 5.

Meeting of the Board of Directors of Carolina Construction Corporation.

The first meeting of the Board of Directors of Carolina Construction Corporation was held at the office of George Lester Lewis, 27 William Street, New York, on the 8th day of May, 1909.

Present: William F. Cox, Stanley R. Ketcham, George Lester Lewis, Frederick H. Branstater, Worthington C. Harper.

On motion, duly seconded, Mr. William F. Cox was selected as chairman of the meeting, and Mr. Stanley Ketcham as secretary thereof.

On motion, duly seconded, the following were adopted as by-laws of the Company:

On motion, duly seconded, Mr. William F. Cox was elected President of the Company, and Mr. Stanley R. Ketcham Secretary and Treasurer.

On motion, duly seconded, the Treasurer was directed to make a call for the payment of subscriptions to the capital stock. A recess having been taken, the Treasurer reported that he had received payment in cash for all the subscriptions to the capital stock and had issued certificates therefor.

The officers of the Company were directed to file certificates of the payment of capital stock as above.

Whereas, this corporation has the opportunity of acquiring a water power proposition on the Hiawassee River from Ketcham & Company and others, and a contract has been prepared and submitted with reference thereto showing the terms and conditions under which same can be acquired.

It is now resolved, that this Company accept such proposition and take an assignment of said water power proposition and issue to Stanley R. Ketcham as trustee, as consideration for such assignment, one hundred shares of the capital stock of this Company when requested by said Ketcham so to do, and enter into a contract with the parties assigning the same, reciting the conditions under which the same shall be held by this Company, and that the officers be authorized and directed to issue said shares of stock and to execute such contract.

Whereas, the Carolina-Tennessee Power Company was organized for the purpose of acquiring water and electric power propositions and operating the same in the State of North Carolina and elsewhere, and is desirous of acquiring from this corporation the Hiawassee water power proposition above referred to and is desirous of having this company build a dam or dams in the said Hiawassee River and erect and equip the power houses necessary to develop the same, and is willing to compensate this corporation by the issuance and delivery of bonds and stock in the said Company; and

Whereas, the contract has been prepared and submitted to this company to carry out such purpose; now, on motion, it is

Resolved, That this corporation enter into the proposed contract and that the officers be authorized and directed to execute the same.

Whereas, Stanley R. Ketcham, as Trustee, entered into a
 342 agreement dated May 12th, 1908, with the Ambursen Hydraulic Construction Company to construct a water power plant on the Hiawassee River, North Carolina, in which it was recited that the said Ketcham was trustee for a corporation to be formed to develop said water power.

Now, on motion duly seconded, it is

Resolved, That this corporation assume the said contract of May 12th, 1908, and enter into a new one of the same tenor, which the officers are hereby authorized to execute and affix the seal.

The resignation of Frederick H. Branstater and Worthington C. Harper, presented in writing, on motion, duly accepted, the vacancies to be filled at a later meeting.

No further business coming before the meeting, it was, on motion, duly made and seconded, adjourned.

STANLEY R. KETCHAM,

Secretary.

Plaintiff's Exhibit No. 6.

An agreement, made this 28th day of May, 1909, between the Carolina Construction Corporation (a New York State corporation hereinafter called the "Construction Company," party of the first part, and the Carolina-Tennessee Power Company (a North Carolina corporation), hereinafter called the "Power Company," party of the second part:

Whereas, the Construction Company is the owner of a water power proposition upon the Hiawassee River, in the State of North Carolina, and of certain lands whereon to erect a dam and water power plant, and of certain lands which will be flooded for the purpose of developing said water power plant, and is about to acquire other lands and interests; and

Whereas, the Power Company has obtained from the State
 343 of North Carolina a charter enabling it to develop water power propositions in the State of North Carolina and to do many other things in the said state, and desires to acquire the said Hiawassee water power proposition and to have the same developed and completed as a water power plant.

Now, this agreement witnesseth:

That for and in consideration of the delivery to it of the stock and bonds hereinafter mentioned, the Construction Company agrees

First. That it will obtain and complete a good title to all the lands necessary to erect a dam about 120 feet in height, and all lands that will be overflowed and flooded by the water impounded by such dam and that it will cause the same to be vested in the said Power Company, free and clear of incumbrances, upon the receipt by it of Three Hundred Thousand Dollars (\$300,000) par value of five per cent (5%) first mortgage bonds and Five Hundred Thousand Dollars of the par value of the stock of the said Power Company.

Second. That it will cause a dam, about 120 feet in height, to be erected at the proper place upon said Hiawassee River, also a power house of sufficient capacity to install electrical water power equipment to develop fifteen thousand (15,000) horse power; that it will install therein electrical water power equipment sufficient to develop at least fifteen thousand (15,000) horse power, that it will erect proper and sufficient spill-ways, and that it will do all work necessary to properly arrange and care for the pond for the storage of water in said Hiawassee River to a point as far up the same as the water will be flooded back by a dam of the proposed height, and that it will do all other things necessary to make a complete water power proposition of the size and horse power above mentioned, and that it shall receive therefor from the Power Company Two Million Dollars (\$2,000,000) face value of first mortgage *gave* five per cent (5%) bonds and Two Millions, Five Hundred Thousand Dollars (\$2,500,000) par value of the stock of the Power company.

Third. That it will, upon demand of the Power Company, erect another dam at least one hundred feet in height, of similar construction to the first above mentioned dam, at a point in the Hiawassee River above the point where the water impounded by the first mentioned dam will cease, for the purpose of forming and creating another storage reservoir; that it will acquire the real estate necessary for such dam and reservoir; that it will erect a power house capable of generating an additional ten thousand (10,000) electrical horse power, and that it will properly equip the said dam and power house with all appliances necessary for that purpose, in consideration of the receipt by it of Two Million Dollars (\$2,000,000) face value of first mortgage five per cent (5%) bonds and Two Million Dollars (\$2,000,000) face value of the stock of the Power Company; it being mutually understood and agreed that the Construction Company shall have the right to do any and all work which shall be done by the Power Company upon the Hiawassee River.

The said Power Company agrees, in consideration of this contract and of the agreements of the Construction Company as herein contained, that it will at once, upon the execution of this contract, issue and deliver to the said Construction Company Five Million Dollars (\$5,000,000) par value of its capital stock, and Three Hundred Thousand Dollars (\$300,000) face value of first mortgage five per cent (5%) bonds; that it will as hereinafter provided, as consideration for the performance by the Construction Company of the conditions of the paragraph hereinafter marked "Second," issue and deliver to the Construction Company Two Million Dollars (\$2,000,000) face value of first mortgage five per cent bonds; and that it will, as hereinafter provided, in consideration of the performance by the Construction Company of the conditions of the paragraph hereinbefore marked "Third," issue and deliver to the said Construction Company Two Million Dollars (\$2,000,000) face value of the first mortgage five per cent bonds.

The said Power Company further agrees that it will cause to be executed and recorded a mortgage upon the premises acquired by it,

and upon all its rights, powers, privileges and property for the sum of Five Million Dollars (\$5,000,000), and that it will at once cause to be issued Two Million, Three Hundred Thousand Dollars (\$2,300,000) face value of five per cent bonds secured by said mortgage.

It is mutually understood and agreed that the Three Hundred Thousand Dollars (\$300,000) face value of five per cent first mortgage bonds shall be delivered upon the execution of this contract; that the Two Million (\$2,000,000) face value of five per cent first mortgage bonds hereinbefore provided to be issued for the work to be performed under paragraph "Second," shall, upon the execution hereof, be signed and delivered by the Power Company to the trustee, who shall be the trustee of the above mentioned mortgage, which bonds shall be held by the said trustee and be delivered to the Construction Company at different times whenever the engineer selected by the parties hereto shall certify that work had been performed sufficient to justify the delivery of the proportion of said bonds called for, or whenever the said Construction Company shall pay to the said trustee the proceeds of the sale of said bonds in cash, at not less than 80% of par thereof; such cash to be held by said trustee and paid out upon certificate of said engineer that sufficient work has been performed to justify such payment, it being understood and agreed that bonds to the amount of at least Twenty-five Thousand Dollars

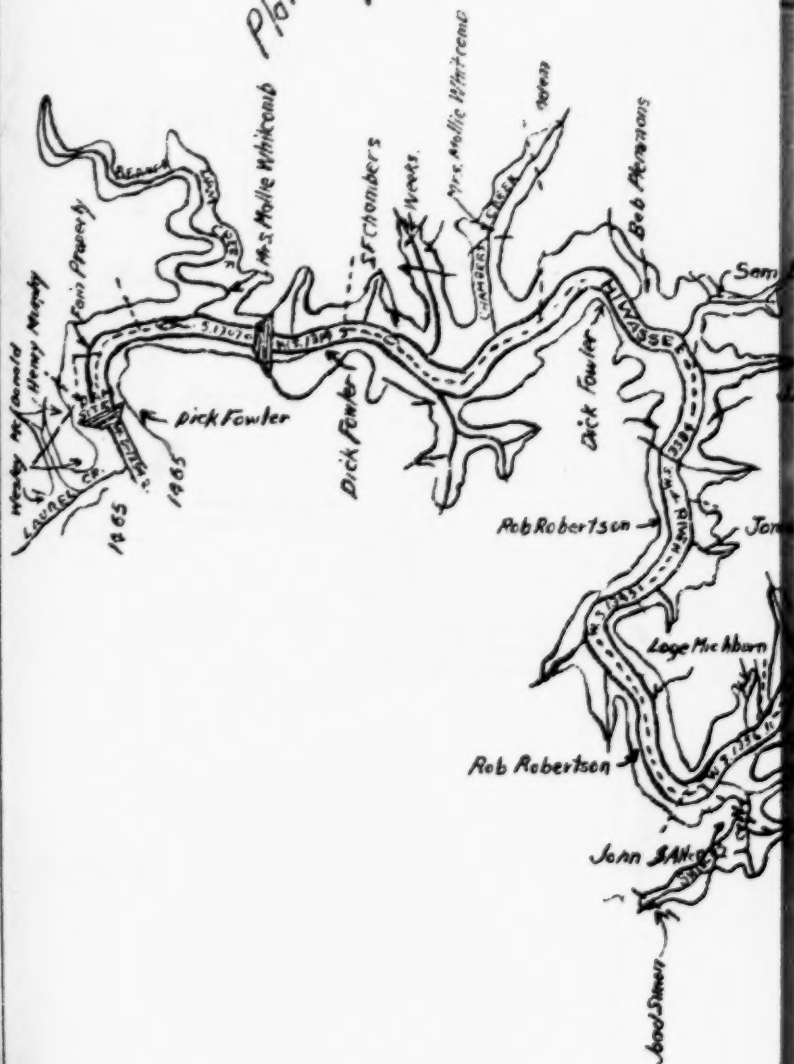
(\$25,000) shall be called for at one time in accordance with 346 this paragraph; and that the Two Million Dollars (\$2,000,000) of bonds, called for, paragraph hereinbefore marked

"Third," will be executed and be delivered to the same trustee whenever said Construction Company shall enter upon the performance of the work agreed to be performed in said paragraph, to be delivered to the Construction Company by the trustee in the same manner and upon the same conditions as above provided for the delivery of bonds issued for work to be performed under paragraph "Second."

It is further mutually understood and agreed that the Ambursen Hydraulic Construction Company shall be the engineer whose certificate shall be a compliance with the next preceding paragraph and shall be sufficient warrant to the trustee for the delivery of bonds of the payment of cash as provided in the said preceding paragraph.

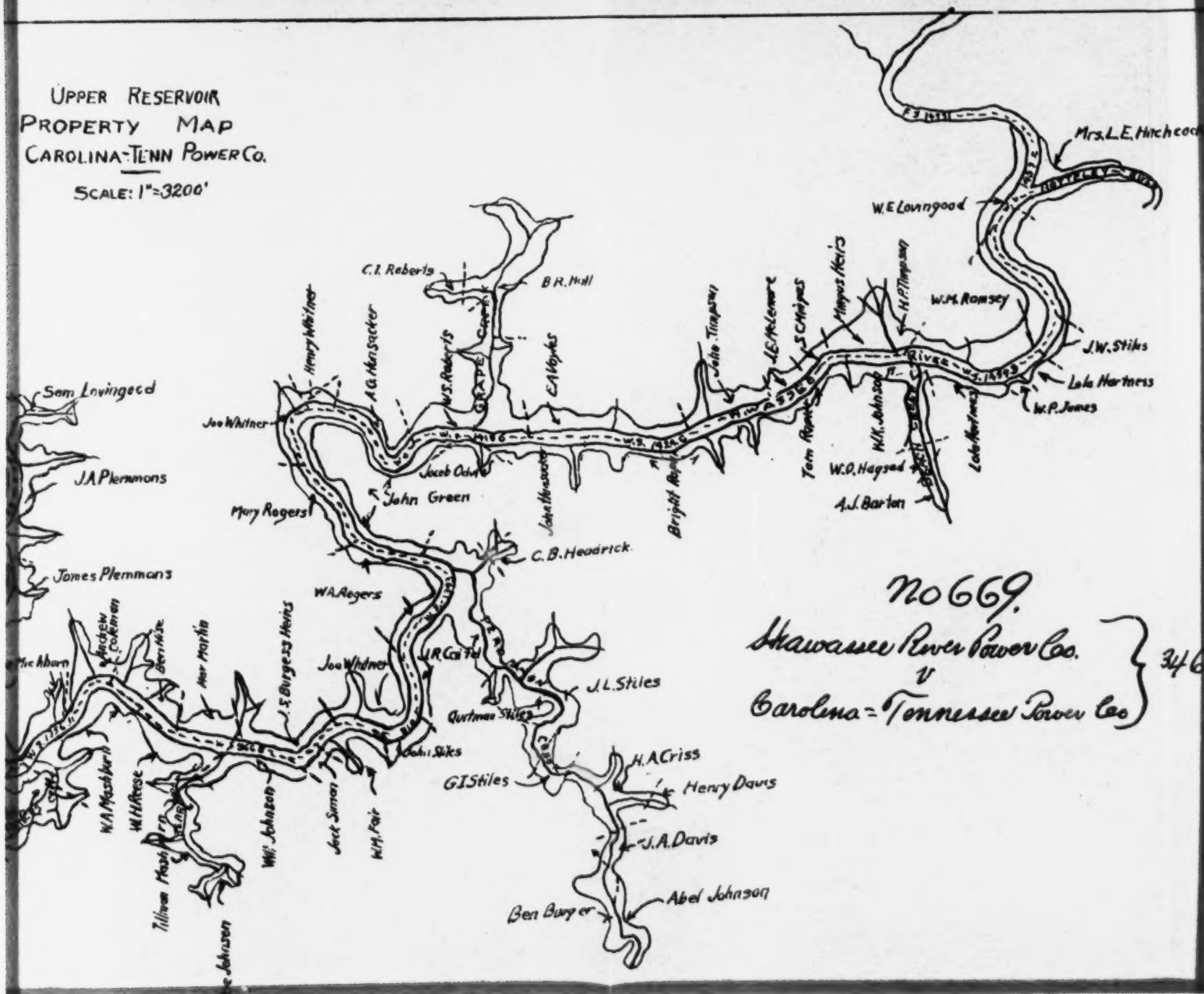
It is further understood that this agreement shall be binding upon and inures to the benefit of the successors and assigns of the respective parties.

UPP
PROP
CAROL

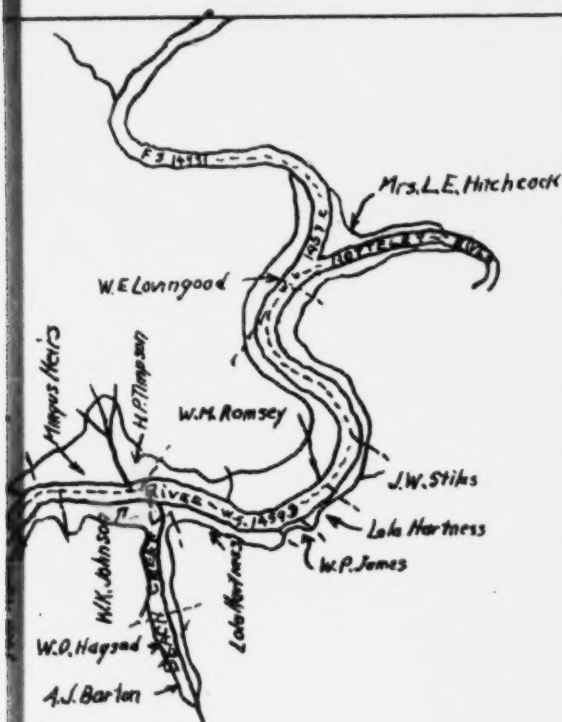


UPPER RESERVOIR
PROPERTY MAP
CAROLINA-TENN POWER CO.

SCALE: 1"=3200'



No 669.
Hawasaw River Power Co. } 346
v
Carolina-Tennessee Power Co.



no 669.
 Tennessee River Power Co. } 346 a.
 v
 Tenn = Tennessee River Co }

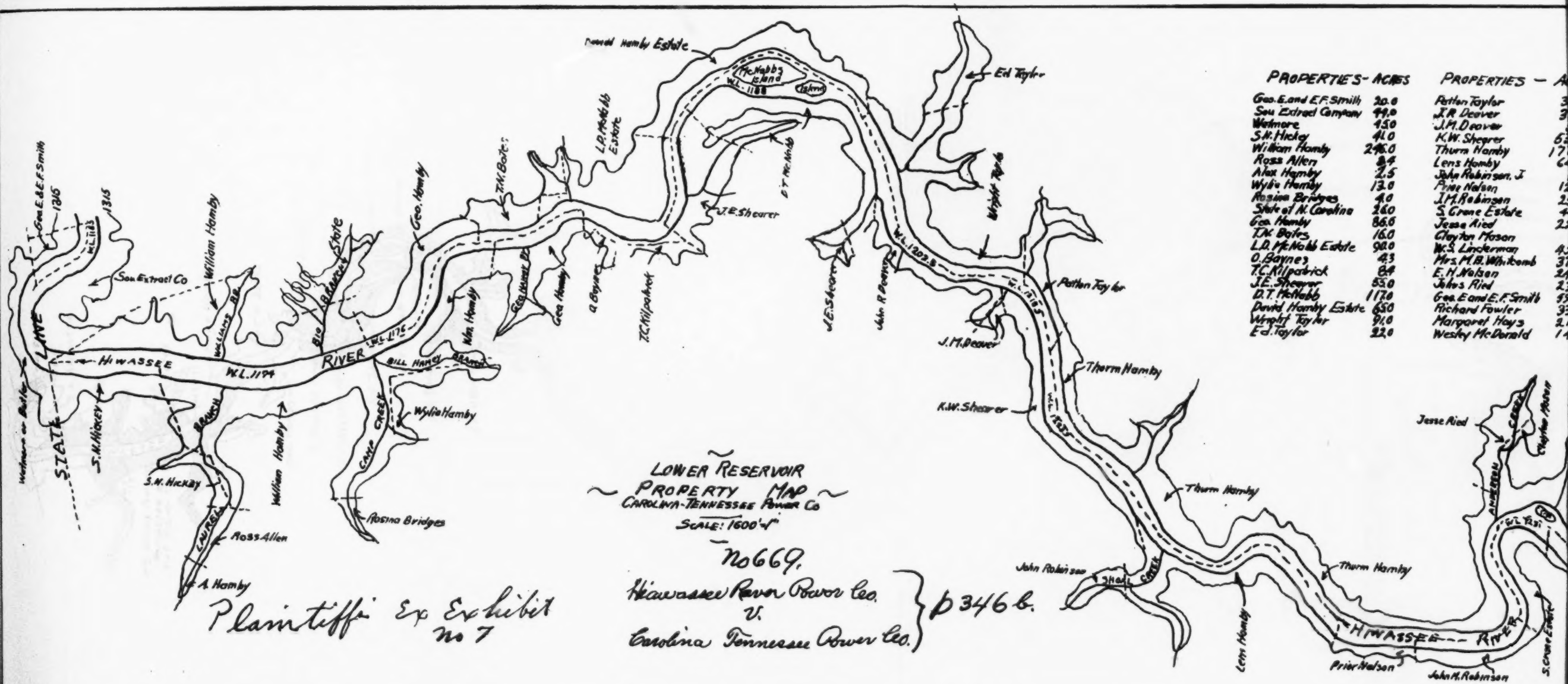
PROPERTIES — ACRES

Wesley McDonald	44.10
Henry Murphy	8.82
Fain Property	34.25
Mrs Mollie Whitcomb	166.26
S.F. Chambers	93.05
Weeks	2.06
Odorn	19.08
Bob Plemmons	88.79
Sam Lovingood	7.38
J.H. Plemmons	58.80
James Plemmons	38.07
Loge Mashburn	76.44
Andrew Coleman	38.22
Ben Hite	40.25
Mar Martin	28.67
J.S. Burgers Heirs	39.69
Joe Whitner	63.21
W.H. Rogers	45.57
Mary Rogers	22.05
Henry Whitner	2.21
A.G. Hunsucker	26.61
W.S. Roberts	77.18
C.T. Roberts	12.65
B.K. Hall	60.27
E.A. Voyles	64.83
John Timpson	31.61
J.L. McLemore	26.46
S.C. Mingus	6.62
Mingus Heirs	36.75
H.P. Timpson	18.38
W.M. Ramsey	100.70
W.E. Lovingood	27.93
Mrs. L.E. Hitchcock	31.61
James Heirs	69.83
J.W. Stiles	8.82
Lola Hartness	30.14

PROPERTIES — ACRES

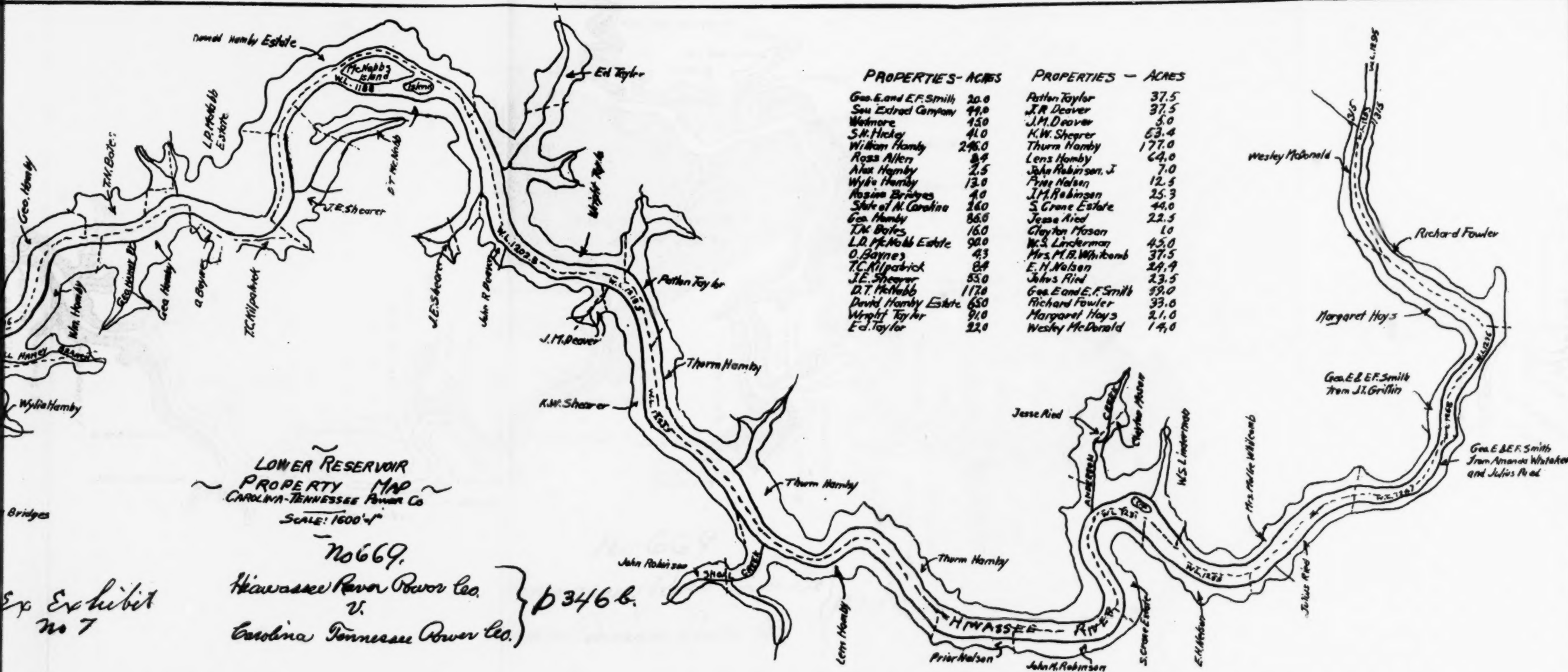
W.P. James	2.94
W.K. Johnson	43.37
W.D. Hagsed	5.88
A.J. Barton	8.82
Tom Rapier	37.49
Bright Rapier	47.78
John Hunsucker	35.28
Jacob Davis	8.82
John Green	83.79
J.R. Carrall	113.93
J.A. Green	1.03
C.B. Headrick	3.70
J.L. Stiles	42.63
Quilman Stiles	40.43
G.T. Stiles	21.46
H.A. Criss	44.84
Henry Davis	1.47
J.A. Davis	3.09
Ben Burger	25.43
Abel Johnson	13.97
John Stiles	17.64
W.M. Fair	30.87
Jack Simon	8.82
Will Johnson	27.93
Tillman Mashburn	31.60
Joe Johnson	5.15
W.H. Reese	40.28
W.A. Mashburn	58.06
John S. Allen	44.10
Joad Simon	1.47
Bob Robinson	88.94
Dick Fowler	255.78

Total ----- 2797.15



Plaintiffs Ex Exhibit
no 7

No 669.
 Hiawasse River Power Co.
 v.
 Carolina Tennessee Power Co. } p 346 b.



Ex Exhibit
No 7

No 669.
Hiwassee River Power Co.
v.
Carolina Tennessee Power Co. } p 346 B.

REPRODUCED COPY BY B. H. Hume & Son, ENGINEERS ATLANTA, GA.



In witness whereof the said parties have caused these presents to be executed by their respective presidents and their respective seals to be hereto affixed the day and year first above written.

CAROLINA CONSTRUCTION
CORPORATION,

[SEAL.]

By WM. F. FOX, *President.*

Attest:

STANLEY R. KETCHAM, *Secretary.*

CAROLINA-TENNESSEE POWER
COMPANY,

[SEAL.]

By WM. L. CHURCH, *President.*

Attest:

STANLEY R. KETCHAM, *Secretary.*

(Here follow diagrams marked pp. 346a, 346b, and 346c.)

Plaintiff's Exhibit No. 9.

Murphy, N. C., January 22d, 1912.

The adjourned meeting of the stockholders of Carolina
 347 Tennessee Power Company was resumed in the offices of the
 Company, at one o'clock P. M., there being present and pre-
 siding George E. Smith, Chairman, with Edmund B. Norvell
 Secretary and a majority of the stock being represented, when the
 following proceedings are had.

John E. Fain, one of the inspectors of election, being absent
 W. M. West was chosen to act in his place.

On motion, the meeting proceeded to the election of Directors and
 Inspectors for the ensuing year, and ballots being distributed and
 collected by the Inspectors, report was made by them that the total
 number of votes cast was 2,470 votes and that 2,470 votes were cast
 for each of the following Directors for the ensuing year, William
 Cox, Stanley R. Ketcham, George E. Smith, Frederick H. Bra-
 stater, and Edmund B. Norvell, and for each of the following In-
 spectors for the next annual meeting, Mr. M. W. Bell and Mr. L. L.
 Bayless, and said persons were duly elected Directors and Inspectors.

There being no reports of the Board of Directors or of the Officers
 and no other business to be transacted, on motion, the meeting ad-
 journed.

EDMUND B. NORVELL,
Secretary of the Meeting.

Plaintiff's Exhibit No. 14-a.

This Agreement, made this 13th day of July, 1909, by and be-
 tween the Carolina Construction Corporation, a corporation exist-
 ing under the laws of the State of New York, and having its prin-
 cipal office in the City of New York (hereinafter called the Corpora-
 tion), party of the first part; and, the Ambursen Hydraulic Con-
 struction Company, a corporation existing under the laws of the
 State of New Jersey, and having its principal place of busi-
 348 ness in the City of Boston, Mass. (hereinafter called the Con-
 structor), party of the second part, witnesseth:

1. That for and in consideration of the payments hereinafter
 mentioned to be made by the Corporation, the Constructor, here-
 agrees at its own proper cost and expense,

(a) To design and construct a concrete-steel dam adapted to the
 condition obtaining at the designated site on the Hiawassee River
 near the Town of Appalachia, in the State of North Carolina, to-
 gether with its contained power house, its bulkheads and embank-
 ments, and all appurtenances thereto, and including the working
 drawings for the setting and installation of the hydraulic and elec-
 tric machinery.

(b) To make such further surveys as may be necessary to de-
 close the precise character of the site and thereafter to prepare

specific detail working drawings governing the construction of the work proposed, including the installation of the hydraulic and electric machinery, together with the transmission line and substations, and all other drawings necessary for the complete development.

(c) To organize, supervise, administer and conduct the construction of the above described work in accordance with the specific detail working drawings above mentioned.

(d) To furnish schedules of materials and supplies, tools and machinery necessary to be used in the construction of said work and the execution of the plans aforesaid—to secure and organize skilled and unskilled labor—to act as the purchasing agents of the Corporation for said materials, supplies, etc., when requested so to do

by the Corporation in writing;—and to turn over to the Corporation any and all discounts which the Constructor may be able to negotiate on any labor, supplies or materials ordered or procured by the Constructor acting for the Corporation.

(e) To audit all construction accounts, keep all books of construction and account and submit a monthly statement of same with vouchers to the Corporation over the signature of a registered public accountant.

(f) To furnish on the work an executive force consisting of an engineer in charge, who shall at all times be in full and exclusive control of the work in every department, and such other superintendents, assistant superintendents, assistant engineers, time-keepers and clerks as may be necessary for the rapid and economical prosecution of the work—and further to furnish all other labor, skilled and unskilled as may be required for an adequate and efficient construction force, all to be paid by the Corporation on payrolls and requisition approved by the general superintendent of the Constructor.

(g) To furnish without charge the services of any member of the Boston office force who may be required for general supervision or inspection, and who shall visit the work for that purpose whenever necessary, and who shall exercise such general supervision over the conduct of the work as may be necessary for the economical and efficient administration of the same.

II.

In consideration of the above mentioned services to be performed by the Constructor, the Corporation agrees to pay for all labor, material, supplies, tools and machinery and every expense in connection with the above described work in the following manner:

(a) On the 1st and 16th days of each month properly certified payrolls showing amount due each person employed shall be submitted by the Constructor to the Corporation, who shall approve or correct the same, and the Corporation shall thereupon pay or cause to be paid the amounts set forth therein in cash, on the 5th and 20th days of the same month, either directly to the persons named in said payrolls, or to the Constructor acting as agent for the Corporation.

(b) All other bills and accounts duly audited as aforesaid shall be submitted on or before the 5th day of each month to the Corporation, and the amounts shown therein shall be paid by the Corporation, either to the person named therein or to the Constructor acting as agent for the Corporation.

III.

In consideration of the faithful performance of this agreement by the Constructor the Corporation agrees,

(a) To pay the Constructor a commission in addition to the payments hereinbefore mentioned of fifteen per cent (15%) on the total cost of the dam and power house, and seven per cent (7%) upon the total cost of the equipment and installation of all hydraulic and electric machinery, including power cranes, transmission lines, sub-stations, and all other incidental work, except the dam and power house—which commission the Constructor agrees to accept in full consideration of all services, plans, specifications and claims, including the use of devices owned by the Constructor, whether patented or otherwise, upon and in connection with the work described in this agreement—that is to say, this commission is in full payment for the combined services of consultation, engineering, supervision and administration from the beginning to the completion of the work—and said commission shall be computed upon all disbursements of each and every month and shall be certified to by the public accountant as aforesaid—and a certified statement of said com-

mission shall be presented to the Corporation on or before
351 the 10th of each month for the month next preceding, and shall be paid by the Corporation to the Constructor on or before the 15th day of said month until said work is fully completed. It is further agreed that the parties hereto may by mutual agreement commute the above floating percentage into a fixed sum based upon the aforesaid percentages and computed upon the final estimates of costs when same shall have been made, said fixed commission being thereafter payable in monthly installments as may be mutually agreed.

(b) To pay for the services of the executive force above described the exact salaries or wages received by them without additional profit to the Constructor; such payments to be made either to the Constructor monthly on the 15th day of each month for the month preceding; or directly to the persons employed and at such times as the Constructor may direct. Said payments to continue for such time as they are employed on the work and until their return to Boston without deduction for temporary stoppages found necessary in the ordinary course of construction.

(c) To pay the actual traveling expenses of the said executive force from Boston to the work and return. To pay the traveling expenses of the representative of the company from the Boston office to the work and return when and only when the same shall have been incurred in and on account of the work herein described and in accordance with the foregoing terms and provisions of this agree-

ment, except provided that no charge or payment shall be made for their personal services—said all traveling expenses to be paid to the Constructor on the 15th day of each month for the expenses incurred during the month preceding, and upon detailed accounts certified to the Corporation by the Constructor.

IV.

352 The Constructor agrees to disburse in a proper manner any and all moneys paid to it as agent for the Corporation, and to render to the Corporation a just and lawful account of the same duly certified by the registered public accountant as aforesaid.

V.

The meaning and intent of this agreement is that the parties hereto shall mutually co-operate for the successful and economical completion of the structure mentioned herein, each party within the limitations hereinbefore described. The Constructor shall use his best energy, ability and experience to the furtherance of this object, and the Corporation shall pay for the Constructor's services as hereinbefore mentioned, together with all other expenses in connection with the work.

VI.

To avoid litigation it is hereby agreed that in the event of any disagreement or dispute arising between the Constructor and the Corporation, in relation to any of the terms of this agreement, they shall submit the matter to arbitration, the Corporation selecting one arbitrator, the Constructor one and these two selecting a third. A decision of the majority of these arbitrators expressed in writing to both parties shall be binding upon both, and the expense of such arbitration shall be equally divided between both parties hereto.

VII.

Whereas a second development on the said Hiawassee River is contemplated by the Corporation, it is hereby agreed that the said Corporation and said Constructor shall and will enter into a mutual contract for the construction of said second development in its entirety of any subsequent development which may be made by the said Corporation, which contract for additional work shall be on the same general terms as to undertakings, payments and commissions as this instrument.

353 In witness whereof the above parties have hereunto set their hands and seals, properly attested, upon the day and date first above written.

CAROLINA CONSTRUCTION CORPORATION,
By WM. F. FOX, *President*.

Attest:

[SEAL.] STANLEY A. KETCHAM, *Secretary*.
AMBURSEN HYDRAULIC CONSTR. CO.,
By W. L. CHURCH, *President*.

Attest:

[SEAL.] H. L. COBURN, *Secretary*.

Plaintiff's Exhibit No. 84.

Annual Meeting Stockholders, January 17, 1910.

Annual Meeting of the Stockholders of the Carolina-Tennessee Power Company, held at the office of the Company in the City of Murphy, State of North Carolina, on the 17th day of January, 1910.

There were present in person and by proxy stockholders representing 2,480 shares of stock.

Proof was made of the presence of a quorum by the production by Mr. Norvell of duly executed and authenticated proxies to him and to Elton F. Smith signed by the owners of 2,465 shares of the Capital stock of the Company and by the production and filing of affidavit by Stanley R. Ketcham, the Treasurer of the Company that the total number of shares of the Company outstanding is 2,500.

Waiver of the notice of service and publication of this meeting signed by all of the Stockholders was received and filed.

354 On motion, duly seconded, Mr. Elton F. Smith was elected Chairman of the meeting and Mr. Edmund B. Norvell Secretary thereof.

Minutes of the previous meeting were read, and on motion duly approved.

On motion, duly seconded, John E. Fain and M. W. Bell were appointed Inspectors of Election.

On motion the meeting proceeded to the election of Directors and Inspectors for the ensuing year, and ballots being distributed and collected by the Inspectors, report was made by them that the total number of votes cast were 2,480 and that 2,480 votes were cast for each of the following as Directors for the ensuing year:

William L. Church
William F. Cox
George F. Smith
Elton F. Smith
Stanley R. Ketcham

and for each of the following as Inspectors for the next annual meeting:

John E. Fain
M. W. Bell

and said persons were duly declared elected Directors and Inspectors.

There being no reports of the Board of Directors or of the Officers, and no other business to be performed, on motion the meeting was adjourned.

(Signed)

EDMUND B. NORVELL,
Secretary of the Meeting.

Plaintiff's Exhibit No. 85.

Annual Meeting Stockholders.

Murphy, N. C., January 16, 1911.

Annual Meeting of the Stockholders of the Carolina-Tennessee Power Company, held at the office of the Company, Murphy, Cherokee County, State of North Carolina, on the 16th day of January, 1911.

There were present in person or by proxy stockholders representing 2500 shares of stock.

Proof was made of the presence of a quorum by the production by Mr. Norvell of duly executed and authenticated proxies to him and J. A. Richardson, signed by the owners of 2500 shares of the Capital stock of the Company, and by the production and filing of an affidavit by Stanley R. Ketcham, the Treasurer of the Company, that the total number of shares of the Company outstanding is 2500.

Waiver of notice as to time, place and objects of the meeting signed by all of the stockholders was received and filed.

On motion, duly seconded, Mr. J. A. Richardson was elected Chairman of the meeting and Mr. Edmund B. Norvell Secretary thereof.

Minutes of the previous meeting were read, and on motion, duly approved.

On motion the meeting proceeded to the election of Directors and Inspectors for the ensuing year, and ballots being distributed and collected by the Inspectors, report was made by them that the total number of votes cast was 2500 and that 2500 votes were cast for each of the following as Directors for the ensuing year: William F. Cox, Stanley R. Ketcham, George F. Smith, Elton F. Smith and F. H. Cranstater, and for each of the following inspectors for the next annual meeting; John E. Fain and W. Christopher, and said persons were duly declared elected Directors and Inspectors.

There being no reports of the Board of Directors or of the Officers, and no other business to be performed, on motion, the meeting was adjourned.

(Signed)

EDMUND B. NORVELL,
Secretary of the Meeting.

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Plaintiff's Exhibit No. 86.

Directors' Meeting.

February 4, 1911.

A special meeting of the newly elected Directors of the Carolina Tennessee Power Company (who were elected at the Annual Meeting held January 16th, 1911), was held at the office of the Company Room 1210, 115 Broadway, New York City, February 4th, 1911, per due notice thereof.

Present: William F. Cox, George F. Smith, Stanley R. Ketcham and Frederick H. Branstater, constituting a quorum.

The Secretary presented a waiver, signed by all of the Directors waiving notice of the time and place of holding this meeting and consenting that same be held at 11:30 A. M. February 4th, 1911 for the purpose of organizing by appointing officers for the ensuing year.

Mr. George E. Smith acted as Chairman of the meeting and Mr. Ketcham was Secretary thereof.

Upon motion duly seconded, Mr. William F. Cox was appointed President of the Company for the ensuing year and Mr. George E. Smith, First Vice-President.

Upon motion, duly seconded, Stanley R. Ketcham was appointed Secretary and Treasurer for the ensuing year.

Upon motion duly seconded, Frederick H. Branstater was appointed Assistant Secretary and Assistant Treasurer for the ensuing year.

No further business coming before the meeting it was on motion adjourned.

(Signed)

STANLEY R. KETCHAM,

Secretary.

Plaintiff's Exhibit No. 87.

Annual Meeting Stockholders.

January 15, 1912.

357 The Annual Meeting of the Stockholders of the Carolina Tennessee Power Company was held at the office of the Company, Murphy, Cherokee County, State of North Carolina on the 15th day of January, 1912.

There were present in person or by proxy stockholders representing 2470 shares of stock.

Proof was made of the presence of a quorum by the production by Mr. Norvell of duly executed and authenticated proxies to him signed by the owners of 2440 shares of the capital stock of the Company, and by the production and filing of an affidavit by Stanley R. Ketcham the Treasurer of the Company, that the total number of shares of the Company outstanding is 2500.

Proof of proper notice of meeting was made by the production of an affidavit of the Secretary showing that he had served notice on the stockholders by mailing to each of them in an envelope with the proper postage prepaid, a notice of the meeting and also an affidavit of publication as required by the Company's charter which affidavits were received and ordered filed.

On motion, duly seconded, Mr. George E. Smith was made Chairman of the meeting and Mr. Edmund B. Norvell Secretary thereof. On motion the meeting adjourned to January twenty-second, 1912. Minutes of the previous meeting were read and approved.

Plaintiff's Exhibit No. 88.

Murphy, N. C., January 22d, 1912.

The adjourned meeting of the stockholders of Carolina-Tennessee Power Company was resumed in the offices of the Company, at one o'clock P. M., there being present and presiding, George F. Smith, Chairman, with Edmund B. Norvell as Secretary and a majority of the stock being represented, where the following proceedings are had.

John E. Fain, one of the Inspectors of election, being absent, W. M. West was chosen to act in his place.

On motion, the meeting proceeded to the election of Directors and Inspectors for the ensuing year, and ballots being distributed and collected by the Inspectors, report was made by them that the total number of votes cast was 2470 votes and that 2470 votes were cast for each of the following Directors for the ensuing year: William F. Cox, Stanley R. Ketcham, George E. Smith, Frederick H. Branstater and Edmund B. Norvell, and for each of the following Inspectors for the next annual meeting: Mr. M. W. Bell and Mr. L. E. Bayless, and said persons were duly elected Directors and Inspectors.

There being no reports of the Board of Directors or of the Officers, and no other business to be transacted, on motion, the meeting was adjourned.

(Signed)

EDMUND B. NORVELL,
Secretary of the Meeting.

Plaintiff's Exhibit No. 89.

Directors' Meeting.

February 14, 1912.

A special meeting of the newly elected Directors of the Carolina-Tennessee Power Company (who were elected at the annual meeting held January 16th, 1912), was held at the office of the Company, Room 1208, 115 Broadway, New York City, February 14, 1912, as per due notice thereof.

Present: William F. Cox, Stanley R. Ketcham and Frederick H. Branstater, constituting a quorum.

The Secretary presented a Waiver, signed by all of the Directors, waiving notice of the time and place of holding this meeting
 359 and consenting that same be held at 11:30 A. M., February 14th, 1912, for the purpose of organizing by appointing officers for the ensuing year.

Mr. William F. Cox acted as Chairman of the meeting and Mr. Ketcham was Secretary thereof.

Upon motion duly seconded Mr. William F. Cox was appointed President of the Company for the ensuing year and Mr. George E. Smith Vice-President.

Upon motion, duly seconded, Mr. Stanley R. Ketcham was appointed Secretary and Treasurer for the ensuing year.

Upon motion, duly seconded, Frederick H. Branstater was appointed Assistant Secretary and Assistant Treasurer for the ensuing year.

No further business coming before the meeting it was on motion adjourned.

(Signed)

STANLEY R. KETCHAM, *Secretary*.

Plaintiff's Exhibit No. 90.

Annual Meeting Stockholders.

Murphy, N. C., January 20, 1913.

The Annual Meeting of the Stockholders of the Carolina-Tennessee Power Company was held at the office of the Company, Murphy, Cherokee County, North Carolina, on the 20th day of January, 1913.

There were present in person or by proxy stockholders representing 2500 shares of stock.

Proof was made of the presence of a quorum by the production by Mr. Norvell of duly executed and authenticated proxies to him and Donald Witherspoon signed by the owners of 2495 shares of the capital stock of the company and by the production and filing of
 360 an affidavit by Frederick H. Branstater, Assistant Treasurer of the Company, that the total number of shares of the Company outstanding is 2500.

Proof of proper notice of meeting was made by the production of an affidavit by Frederick H. Branstater showing that he had served notice on the stockholders by mailing to each of them, in an envelope, with the proper postage prepaid, a notice of the meeting and also an affidavit of publication as required by the Company's Charter, which affidavits were received and ordered filed.

On motion, duly seconded, Mr. Witherspoon was made Chairman of the Meeting and Mr. Edmund B. Norvell Secretary thereof.

On motion duly seconded, the meeting proceeded to the election of Directors and Inspectors for the ensuing year and ballots being distributed and collected by the Inspectors, report was made by them that the total number of votes cast was 2500 votes and that 2500 votes were cast for each of the following Directors for the ensuing year: William F. Cox, Stanley R. Ketcham, George E. Smith, Frederick H. Branstater and Edmund B. Norvell, and for each of

the following Inspectors for the next annual meeting: M. W. Bell and L. E. Bayless, and said persons were duly elected Directors and Inspectors.

After the reading of the minutes of previous meetings and approval thereof, there having been no reports of the Board of Directors or of the Officers, and no other business to be transacted, on motion the meeting was adjourned.

(Signed)

EDMUND B. NORVELL,
Secretary of the Meeting.

Plaintiff's Exhibit No. 91.

Directors' Meeting.

January 25, 1913.

A special meeting of the newly elected Directors of the Carolina-Tennessee Power Company (who were elected at the Annual Meeting held January 20th, 1913), was held at the office of the Company, Room 621, 115 Broadway, New York City, January 25th, 1913, as per due notice thereof.

President: William F. Cox, Stanley R. Ketcham and Frederick H. Branstater, constituting a quorum.

The Secretary presented a waiver, signed by all of the Directors, waiving notice of the time and place of holding this meeting and consenting that same be held at 11:30 A. M., January 25th, 1913, for the purpose of organizing by appointing officers for the ensuing year.

Mr. William F. Cox acted as Chairman of the meeting and Mr. Ketcham was Secretary thereof.

Upon motion, duly seconded, Mr. William F. Cox was appointed President of the Company for the ensuing year and Mr. George E. Smith Vice-President.

Upon motion, duly seconded, Stanley R. Ketcham was appointed Secretary and Treasurer for the ensuing year.

Upon motion, duly seconded, Frederick H. Branstater was appointed Assistant Secretary and Assistant Treasurer for the ensuing year.

No further business coming before the meeting it was on motion adjourned.

(Signed)

STANLEY R. KETCHAM, *Secretary.*

Plaintiff's Exhibit No. 92.

Directors' Meeting.

July 21, 1913.

A special meeting of the Board of Directors of the Carolina-Tennessee Power Company was held on July 21st, 1913, at three P. M.

Present: Messrs. William F. Cox, Stanley R. Ketcham and Frederick H. Branstater, constituting a quorum.

The Secretary presented a waiver signed by all of the Di-

rectors, waiving notice of the time and place of holding this meeting and consenting that same be held at three P. M., July 21, 1911 for the purpose of authorizing Mr. George E. Smith, Vice-President of the Company, to sell certain timber located on the Company's property in North Carolina.

Mr. William F. Cox acted as Chairman of the meeting and Mr. Branstater Secretary thereof.

Upon motion, duly seconded, the following resolutions were adopted:

Whereas, there is timber on certain of the lands owned by this Company in Cherokee County, North Carolina, which timber is not necessary for the Company's business, and which can be sold and the proceeds used for the Company's business,

Now therefore be it resolved, that Mr. George E. Smith, Vice-President of the Company, be and he is hereby authorized to sell at such price as in his judgment he deems proper, certain timber located on the property owned by the Company, in Cherokee County, North Carolina, known as the Bob Plemmons and James Plemmons places and also on what is known as the Whittaker-Ray property. And that the said George E. Smith be and he hereby is authorized to effect such sale at the earliest possible moment, and to use the proceeds thereof, or so much as is necessary, in the discharge of certain indebtedness created by him in the interest of this Company, and to make to the Treasurer of this Company a full report of the entire transaction, showing the amount of timber sold and from what property, and at what price, and submitting a proper account of the disposition of the proceeds thereof.

363 Be it further resolved, that the Assistant Secretary of this Company furnish Mr. George E. Smith a certified copy of the above resolutions.

No further business coming before the meeting it was on motion adjourned.

(Signed)

FREDERICK H. BRANSTATER,
Secretary of the Meeting.

Plaintiff's Exhibit No. 97.

Received June 26, 1911; Ans'd June 26, 1911, by S. R. K.

Carolina-Tennessee Power Company,
Murphy, N. C.

June 24th, 1911.

Mr. Stanley R. Ketcham, 115 Broadway, New York City, N. C.

MY DEAR MR. KETCHAM: We have filed suits against the Hitchcock property, against James and Florence Moore, the James heirs and Lola Hartness.

Mr. Dillard and Mr. Norvell agreed that it would do just as well to wait and see what Browning would do, before beginning proceedings against Ramsey, but Mr. Norvell tells me this morning that he thinks we ought to begin proceedings against him at once. Mr.

Dillard is out of town today, and we will take the matter up with him the first of next week.

I have told a few men from down the river about Browning's application for a charter, and I think it is already generally known. I have filed the maps that I had with the Clerk of the Court, and wish you would send me maps of both the Lower and Upper Basin.

Regarding the prices of the lands that we will have to secure, while

I think I have made ample allowance, if it is not too late, you might add \$5,000.00, so as to be entirely on the safe side.

I have not heard anything further from Mr. Adams. Do you and Mr. Cox care to have me make a price at this time? If so give me your ideas.

I wish you would send me a copy of Mr. Church's letter, asking for an option, as I am somewhat curious as to what kind of a spiel he put up.

Do you know whether the Billsbey Company subscription was all taken on the Appalachian Power Company?

Hoping to hear from you soon, and with kindest regards, I am,

Sincerely,

(Signed)

G. E. SMITH.

Plaintiff's Exhibit No. 93.

Special Meeting of Stockholders.

Murphy, N. C., April 23, 1914.

A special meeting of the stockholders of the Carolina-Tennessee Power Company was held at the office of Edmund B. Norvell, Murphy, Cherokee County, North Carolina, on the 23rd day of April, 1914, as per notice to stockholders and advertisement in the Cherokee Scout. This meeting was called for the purpose of electing five Directors and two Inspectors of Election for the ensuing year, or until their successors are elected and qualify, and was made necessary on account of the Annual Meeting of stockholders not being held.

There were present in person or by proxy stockholders, representing twenty-four hundred, fifty-five shares of stock.

Proof was made of the presence of a quorum by the production by Mr. Norvell of duly executed and authenticated proxies to him and L. E. Bayless, signed by the owners of 2,450 shares of the Capital stock of the Company, and by the production and filing

of an affidavit made by Stanley R. Ketcham, the treasurer of the Company, that the total number of shares of the company

outstanding is 2,500. Proof of proper notice of meeting was made by the production of an affidavit by Stanley R. Ketcham, showing that he had served notice on the stockholders by mailing to each of them in an envelope properly addressed and proper postage prepaid a notice of the Meeting, and also an affidavit of publication, as required by the Company's Charter, which affidavits were received and filed.

On motion, duly seconded, Mr. L. E. Bayless was elected chairman of the meeting, and Mr. Edmund B. Norvell, secretary, thereof.

On motion, duly seconded, the meeting proceeded to the election of Directors and Inspectors for the ensuing year, and ballots being distributed and collected by the Inspector, report was made by them that the total number of votes cast was Twenty-four Hundred and fifty-five votes, and the Twenty-four Hundred and fifty-five votes were cast for each of the following Directors for the ensuing year:

W. V. N. Powellson, Edmund B. Norvell, E. H. Shufro, A. E. Silfer, and Stanley R. Ketcham, and that Twenty-four hundred fifty-five votes were cast for each of the following Inspectors of Election for the ensuing year:

A. G. Deweese and M. W. Bell, and said persons were duly elected Directors and Inspectors.

After the reading of the Minutes of the previous meetings and approval thereof, and there being no other business to be transacted on motion duly seconded, the meeting was adjourned.

EDMUND B. NORVELL,
Secretary of the Meeting.

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Plaintiff's Exhibit No. 94.

Meeting of Directors.

June 16th, 1914.

A meeting of the Board of Directors of the Carolina-Tennessee Power Company was held at the office of W. V. N. Powellson, at 60 Wall Street, Borough of Manhattan, New York City, New York, on the 16th day of June, 1914, at 10:30 o'clock in the forenoon, pursuant to a written waiver of notice signed by all the Directors of the Company.

There were present the following Directors, being a majority of the Board: W. V. N. Powellson, E. H. Shufro and Stanley R. Ketcham.

The meeting was organized by the choice of W. V. N. Powellson as chairman and Stanley R. Ketcham as secretary.

The written waiver of notice signed by all the Directors was read and on motion duly made, seconded and carried, ordered spread upon the minutes.

Waiver of Notice of Meeting of the Board of Directors of the Tennessee Power Company.

We, the undersigned, being all of the Directors of the Carolina-Tennessee Power Company, do hereby waive all notice of the time, place and purpose of a Meeting of the Board of Directors of the Carolina-Tennessee Power Company, and do hereby fix the time as June 16th, 1914, at 10:30 o'clock in the forenoon, and the office of W. V. N. Powellson, 60 Wall Street, New York City, as the place of said meeting, and do hereby agree that the purpose of said meeting shall be the election of officers for the ensuing year, and the transaction

of such other business as may legally come before said meeting.

367 Dated New York, June 16th, 1914.

(Signed)

W. V. N. POWELLSON.
STANLEY R. KETCHAM.
E. H. SHUFRO.
A. E. SLIFER.
EDMUND B. NORVELL.

On motion, duly made, seconded and carried it was voted to proceed to the appointment of officers of the Company for the ensuing year or until their successors be chosen.

W. V. N. Powellson was nominated as president of the Company and on vote being taken Mr. Powellson was unanimously appointed President of the Company.

Stanley R. Ketcham was nominated as Secretary of the Company, and on vote being taken was unanimously appointed Secretary of the Company.

E. H. Sufro was nominated as Treasurer and Assistant Secretary of the Company and upon vote being taken was unanimously appointed Treasurer and Assistant Secretary of the Company.

W. E. Silfer was nominated as Vice-President of the Company and upon vote being taken was unanimously appointed Vice-President of the Company.

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

Resolved, that an Executive Committee of the Board of Directors be and hereby is created, consisting of two members, the President, W. V. N. Powellson, and the Treasurer, E. H. Sufro, and said Executive Committee is hereby clothed with the full powers of the Board of Directors with reference to the affairs of the Company when the Board is not in session.

368 Upon motion duly made, seconded and unanimously carried the following resolution was adopted:

Resolved, that the Executive Committee of this Corporation be and it hereby is authorized to borrow money for this Company in its discretion, and to give therefor such notes and pledges as to them may seem proper, and said Executive Committee is hereby authorized to make and execute with the lender such agreement or agreements in respect to the securing of indebtedness of this Company now or hereafter existing as may be required, or as seems expedient.

On motion duly made, seconded and carried the following resolution was adopted:

Resolved, that the President of the Corporation, W. V. N. Powellson, be and he hereby is empowered to direct the expenditure of the moneys of the Corporation in the acquisition of lands or property necessary for its purposes, or for the general expenses and purposes of the Company in the advancement of its business.

On motion duly made, seconded and unanimously carried it was

Resolved, that the office in New York City of the Carolina-Tennessee Power Company, heretofore maintained at 115 Broadway,

New York City, New York, be and it is hereby discontinued, and that an office be established at 60 Wall Street, New York City.

Upon motion duly made, seconded and carried, the following resolution was adopted:

Whereas, it is provided in the By-Laws of this Company that the Company may appoint a Registrar and also a Transfer Agent, and

Whereas, the Directors, at a meeting held on the 23d of June, 1909, appointed Ketcham & Company, a New York State Corporation, as Transfer Agent, and the Standard Trust Company of New York as Registrar, and

369 Whereas, it is evident in the opinion of this Board that such Transfer Agent and Registrar are not necessary, therefore,

Be it resolved, that the appointment of Ketcham & Company as Transfer Agent and of the Standard Trust Company as Registrar be and the same are hereby rescinded.

On motion duly made, seconded and carried the meeting then adjourned.

STANLEY R. KETCHAM,
Secretary of the Meeting.

Plaintiff's Exhibit No. 95.

Meeting of Directors.

July 27th, 1914.

A special meeting of the Board of Directors of the Carolina-Tennessee Power Company was held at the office of W. V. N. Powellson at 60 Wall Street, Borough of Manhattan, New York City, New York, on the 27th day of July, 1914, at 10:00 o'clock in the forenoon, pursuant to a written waiver of notice signed by all the Directors of the Company.

There were present the following Directors, being a majority of the Board: Stanley R. Ketcham, E. H. Shufro and A. E. Slifer.

The meeting was organized by the choice of A. E. Slifer as Chairman and Stanley R. Ketcham as Secretary.

The written waiver of notice signed by all the Directors was read and on motion duly made, seconded and carried, ordered spread upon the minutes.

370 Waiver of Notice of Meeting of the Board of Directors of Carolina-Tennessee Power Company.

We, the undersigned, being all of the Directors of the Carolina-Tennessee Power Company, do hereby waive all notice of the time, place and purpose of a Meeting of the Board of Directors of the Carolina-Tennessee Power Company, and do hereby fix the time at July 27th, 1914, at 10:00 o'clock in the forenoon, and the office at W. V. N. Powellson, 60 Wall Street, New York City, as the place of the said meeting, and do hereby agree that the purpose of said meet-

ing, shall be the election of an Assistant Secretary for the ensuing year, to authorize the proper officers of the Company to execute purchase money mortgages in the Acquisition of property, and the transaction of such other business as may legally come before said meeting.

Dated, New York, July 27th, 1914.

(Signed)

W. V. N. POWELLSON.
STANLEY R. KETCHAM.
E. H. SHUFRO.
A. E. SLIFER.
EDMUND B. NORVELL.

Upon motion duly made, seconded and unanimously carried it

Resolved, that Edmund B. Norvell be, and he hereby is elected Assistant Secretary of this Company for the ensuing year or until his successor is appointed and that the Secretary be and he hereby is directed to notify Mr. Norvell of his election as an Assistant Secretary.

Whereas it appears to be necessary and desirable to acquire title to property for the benefit of the Company and to give back to the owners purchase money mortgages, therefore, upon motion duly made, seconded and unanimously carried, it

Resolved, that the President and Secretary or an Assistant Secretary be and they hereby are authorized and directed to execute Purchase Money Mortgages in the acquisition of property for the benefit of this Company when in the judgment of the President it is desirable to do so.

On motion duly made, seconded and carried the meeting then adjourned.

STANLEY R. KETCHAM,
Secretary of the Meeting.

Plaintiff's Exhibit No. 96.

Meeting of Directors.

August 17th, 1914.

A special meeting of the Board of Directors of the Carolina-Tennessee Power Company was held at the office of W. V. N. Powellson, at 60 Wall Street, New York City, Borough of Manhattan, in New York State, on the 15th day of August, 1914, at 3:30 o'clock in the afternoon, pursuant to a written waiver of notice signed by all the Directors of the Company.

There were present the following Directors, being a majority of the Board: W. V. N. Powellson, Stanley R. Ketcham and E. H. Shufro.

Mr. Powellson presided and Mr. Ketcham acted as Secretary.

Waivers of notice as to the time and place of the meeting signed by all the Directors were received and filed.

The President reported that pursuant to the authority conferred upon him at meetings of the Board held on June 16th, 1914, and July 27th, 1914, he had taken steps to acquire certain lands on the Hiawassee River which are necessary for the works of this Company, as heretofore located and as shown by the survey there
372 of deposited in the office of the Clerk of the Superior Court of Cherokee County; that he had purchased about 774 acres of land from one Dick Fowler or Alvin S. Farrow for \$15,000.00 paid in cash and in purchase money mortgage for \$1,000, payable July 25, 1916, without interest, and about 303 acres from one Jesse R. Carroll, for \$3,000, paid in cash, and a purchase money mortgage for \$2,415, payable July 27th, 1916, without interest and that he has caused an action to be brought for the purpose of condemning about 30 acres of land belonging to one J. J. Simon.

The President further reported that on or about July 13th, 1914 a corporation named the Hiawassee River Power Company was organized under the General Laws of the State of North Carolina, for the alleged purpose, among other things, of generating and supplying electricity for light, heat and power, and developing the water power of the Hiawassee River, and that the said corporation has acquired from one Hugh Van Deventer certain lands, and contracts or options for the purchase of lands, on the Hiawassee River which are necessary for the works of this Company, and that between July 16th and July 20th, said corporation had commenced actions to condemn certain other lands on the Hiawassee River which are necessary for the works of this Company, including a part of the land purchased by this Company from Dick Fowler or Alvin S. Farrow, and part of the land purchased by this Company from John Green, and that the said corporation was threatening to construct thereon dams, reservoirs and power plants which would interfere with the rights of this Company.

The President further reported that he had been advised by Counsel that this Company had the right to construct its works for the development of water power and the generation of electric current, upon and along the banks of the Hiawassee River from
373 a point about 500 feet above the mouth of Cain Creek and the spiral of the Louisville and Nashville Railway Company, near the Tennessee State line, to a point about 2,000 feet above the mouth of the Nottley River, and extending about 3,000 feet up the Nottley River, as marked upon the ground by engineers in 1909, and shown by the survey thereof filed in the office of the Clerk of the Superior Court of Cherokee County, in June, 1911, and that said location had been determined and adopted long before the said Vandeventer for the Hiawassee River Power Company has acquired or claimed any lands or other interests in or on the said river, the rights of this company were prior and superior to any rights or claims of the Hiawassee River Power Company.

The President further reported that he had given to the Hiawassee River Power Company notice of the rights and claims of this

Company by a letter dated and mailed July 27th, 1914, a copy of which was read to the Board. The following is a true copy of said letter:

"Murphy, N. C., July 27th, 1914.

Hiawasse River Power Company, Murphy, N. C.

GENTLEMEN: It has, within the last few days, been brought to our attention that your company has recently organized and is proceeding to make surveys and to purchase and negotiate for the purchase of lands for the alleged purpose of developing power by using the waters of Hiawasse River in North Carolina.

The lands for which it is reported you are negotiating, are a part of the lands which are essential to us in prosecuting our plans for the development of power on the Hiawasse River, and the use by you for power purposes of these lands and those you have recently acquired is wholly inconsistent with our use of them for a like purpose.

Our plans contemplate the use for power purposes for public use of all the lands on both banks of the Hiawasse River, beginning with the lands of Mrs. E. W. Coit, now under condemnation by us, near the junction of the Nottley River with the Hiawasse River and extending down the Hiawasse River to a point in the Hiawasse River adjacent to lands owned by us bordering on the State line between North Carolina and Tennessee, as evidenced by surveys deposited in the office of the Clerk of the Superior Court at Murphy, Cherokee County, North Carolina, in accordance with the provisions of our charter, and as further evidenced by many deeds and contracts entered into by us with the owners of such land and registered in the office of the Register of Deeds at Murphy, the last being of July 16th, 1914, and other acts of public and private record.

We hereby give you notice that we have entered into possession of these lands and that any title you may take to the same will be subject to our prior right to use them for power purposes.

Yours truly,

CAROLINA-TENNESSEE POWER
COMPANY,

(Signed)

By MERVYN A. RICE, *Attorney.*"

The President further reported that the counsel of the Company had advised the commencement of an action against the Hiawasse River Power Company to prevent it from interfering with the rights of this Company on the Hiawasse River, and also the commencement of proceedings to condemn the lands necessary for the work of this Company which it may not be able to acquire by purchase.

On motion, duly seconded, it was unanimously resolved

Whereas the location of the works of this Company on the Hiawasse River for the development of water power and the generation of electric current has heretofore been approved and adopted by the Directors of this Company, but since that time changes have taken place in the ownership of the stock and bonds of the Company, and new directors and officers have been elected,

and the present Board desires to carry out the original plans of the Company for the development of water power and the generation of electric current on the Hiawassee River, now therefore be it resolved

(1) That the location of the works of this Company on the Hiawassee River for the development of water power and the generation of electric current, which has been determined and marked upon the ground by the engineers of this Company and is shown by a survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County, be and it hereby is approved and adopted by this Board.

(2) That all the acts of the President of this Company in connection with the purchase and condemnation of lands necessary for the works of this Company, and the notice to the Hiawassee River Power Company of the rights and claims of this Company, be and they hereby are approved and ratified.

(3) That the President of this Company be and he hereby is authorized and directed to negotiate for and purchase if possible upon terms satisfactory to him, all other lands necessary for the works of this Company, to commence or cause to be commenced proceedings for the condemnation of such lands necessary for such works as he may be unable to acquire by purchase upon terms satisfactory to him, and to take such steps and make such arrangements as he may deem desirable for the construction of such works.

(4) That the President of this Company be and he hereby is authorized and directed to commence or cause to be commenced
376 against the Hiawassee River Power Company such action or actions to prevent it from interfering with the rights of this Company on the Hiawassee River as counsel may advise to be desirable for the interests of this Company.

On motion, duly made, seconded and carried the meeting then adjourned.

STANLEY R. KETCHAM,
Secretary of the Meeting.

Defendant's Exhibit No. 1.

(No. 12393.)

Certificate of Incorporation of Hiawassee River Power Company.

This is to certify, that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the laws of the State of North Carolina, as contained in chapter 21 of the Revisal of 1905 of North Carolina, said chapter being entitled "Corporations," and do severally agree to take and subscribe the number of shares of capital stock in the said corporation set opposite our respective names, and to that end do hereby set forth:

1. The name of this corporation is Hiawassee River Power Company.

2. The location of the principal office of the corporation in this State is Murphy, Cherokee County, but it may have one or more

branch offices and places of business out of the State of North Carolina, as well as in said State.

3. The said corporation is formed for the following purposes, to-wit:

(a) To supply to the public, including both individuals and corporations, whether private or municipal, anywhere in the State of North Carolina and elsewhere in the United States power in the form of electric current, hydraulic, pneumatic and steam pressure, or any of the said forms, and in any and all other forms for use in driving machinery, and for light, heat and all other uses to which the said power can be applied, to fix charges and collect and receive payment therefor; and for the purpose of enabling this corporation to supply power as aforesaid, the company is authorized and empowered to buy, or otherwise acquire, generate, develop, store, use, transmit and distribute power of all kinds and to locate, acquire, construct, equip, maintain and operate a plant or plants, with all necessary dams, water ways, sluices, buildings, structures, machinery and instrumentalities whatsoever useful and necessary in connection therewith on the Hiawassee River in the State of North Carolina, near the town of Murphy, in the County of Cherokee, and upon any other streams in said State, and from the same, or any other initial point in the State of North Carolina, to distribute to consumers and users, both within said State, and without said State, all such power hereinbefore mentioned, in any and all of the forms, and to establish lines for the transmission thereof by wires, poles or underground, and by cable, pipes, conduits, tubes and all other convenient appliances and instrumentalities for power transmission, with such connecting lines, and also such branch lines as the board of directors of said corporation may elect or authorize to be located for receiving, transmitting and distributing power.

(b) And for such purposes said corporation may acquire, own, hold, sell or otherwise dispose of water power and water privileges in the State of North Carolina, and may locate, acquire, construct, equip, maintain and operate all necessary plants for generating and developing by water, steam or any other means, and for storing, using, transmitting, distributing, selling and developing power, including dams, gates, bridges, sluices, tunnels, stations and other buildings, boilers engines, machinery, switches, lamps, motors and all other works, structures and appliances necessary or useful in connection therewith.

(c) To build, construct, maintain and operate street railroads and other railroads and transportation lines, tramways, turnpikes, roads, flumes, lakes and canals and to carry freight and passenger- and to charge, collect and receive tolls or fares for the same in as full and ample manner and to the extent allowed by section 1138 of the Revisal of North Carolina of 1905, and all amendments thereto, and as allowed and provided in any manner by said chapter 1 of said Revisal of North Carolina of 1905.

(d) To build, construct, equip, operate and maintain telephone and telegraph lines, and to erect all necessary poles, wires, and instrumentalities, and to install, operate and maintain all useful and neces-

sary appliances in connection therewith, and to charge, collect and receive tolls therefor.

(e) To carry on and conduct the business of generating and making, transmitting, furnishing and selling electricity for the purposes of lighting, heating and power, and to furnish and to sell and contract for the furnishing and sale to persons, corporations, towns and cities of electricity for illuminating purposes, or as motive power for running and propelling engines, cars, machinery and apparatus, and also for all other purposes for which electricity is now or may hereafter be used, and to construct, maintain and operate a plant or plants for manufacturing, generating and transmitting electricity, to deal in generating, furnishing, supplying and selling electricity, and all other kinds of power, forces, fluids and currents for heating and power purposes, and to carry on any and all business in any wise appertaining to or connected with the manufacture,

379 generation and distribution of electricity for light, heat and power purposes; to manufacture, purchase, repair, sell and deal in all machinery and appliances used in connection with the generation and distribution of electricity, and to purchase, acquire, own, use, lease and furnish any and all kinds of electric machinery, apparatus and appliances.

(f) To supply water to persons, corporations, factories, towns and cities for domestic purposes and for use as power and for manufacturing purposes, and to charge, receive and collect charges and rates therefor.

(g) To purchase, sell, exchange and otherwise deal in, goods, wares and merchandise of every kind and description, and conduct, by wholesale or retail, in any of its branches, the business of general merchandising whether the same shall be conducted in connection with its plants or operations, or otherwise, and to engage in the manufacture and sale of any and all articles of trade and commerce whatsoever.

(h) To purchase, own, hold and acquire, whether by gift, purchase or condemnation, any and all lands and leases of real estate, and to construct and equip all necessary dams, power houses and structures, and to flood and back water, and to install all necessary machinery and apparatus whatsoever in connection with or useful in carrying on the business and affairs of said corporation.

(i) To condemn all necessary lands and rights in land of whatever nature to the extent and in as full and ample manner as is allowed and permitted under said chapter 1 of the Revisal of North Carolina of 1905, and under chapter 32 of the Revisal of North Carolina of 1905, and all amendments thereto; said corporation to have all the powers whatsoever given and provided for, both in said chapter 21 and chapter 32 of said Revisal of North Carolina of 1905 and amendments thereto.

380 (j) To acquire, own, hold, sell, lease and dispose of lands, easements and rights in lands of every kind and description whatsoever, to divide into lots and lay off streets, and to improve the same, and erect buildings and structures thereon for all purposes.

(k) To borrow money, to issue its notes, obligations, bonds, and

debentures, from time to time, upon such terms as the stockholders or board of directors by their authority may determine, and to secure the same by mortgage or mortgages, deeds of trust or other encumbrances upon its property and franchises, in whole or in part, and to acquire by original subscription, contract, or otherwise, and to hold, manage, pledge, mortgage, sell, convey and dispose of, or otherwise deal with, in like manner as individuals, may do, shares of the capital stock, notes, bonds and other obligations of other companies and corporations, organized under the laws of this or any other states, and to so hold, manage pledge, mortgage, sell and dispose of notes, bonds and other obligations of individual persons.

(1.) To do any and all other things, and to own, acquire, sell and dispose of any other property, real personal or mixed, which may be necessary and proper in connection with the business of said corporation.

(4.) The total authorized capital stock of this corporation is three hundred thousand dollars, divided into three thousand shares of the par value of \$100.00 each; but the corporation may organize and begin business when \$100,000.00 of the capital stock, composed of 1000 shares, shall have been subscribed for.

(5.) The names and postoffice addresses of the subscribers for stock and the number of shares subscribed for by each, the aggregate of which being the amount of capital stock with which the company commence business, are as follows.

381 Hugh F. Vandeventer, Knoxville, Tennessee, 980 shares.
John E. Fain, Murphy, N. C., 10 shares.

Pryor E. Nelson, Murphy, N. C., 10 shares.

(6.) The period of existence of this corporation is sixty years.

(7.) The board of directors of this corporation shall have power, by vote of a majority of all the directors, and without the assent of the stockholders, to make, alter, amend and rescind the by-laws of this corporation.

In witness whereof, we have hereunto set our hands and seals, this the 30th day of June, 1914.

HUGH F. VANDEVENTER. [SEAL.]

JOHN E. FAIN. [SEAL.]

PRYOR E. NELSON. [SEAL.]

Signed, sealed and delivered in the presence of

FAYETTE F. VANDEVENTER,

As to Hugh F. Vandeventer's signature.

STATE OF TENNESSEE,

County of Knox, ss:

This is to certify, that on the 30th day of June, A. D., 1914, before me, W. S. Miller, a notary public in and for Knox County, Tennessee, personally appeared Hugh F. Vandeventer, who executed the foregoing certificate of incorporation of Hiawassee River Power Company, and I having first made known to him the contents thereof,

he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, this the 30th day of June, 1914.

[NOTORIAL SEAL.]

W. S. MILLER,
Notary Public.

My commission expires on the — day of October, 1914.

382 NORTH CAROLINA,
Cherokee County, ss:

This is to certify that on this 1st day of July, A. D., 1914, before me, J. E. Keener, Deputy Clerk Superior Court of Cherokee County North Carolina, personally appeared John E. Fain, and Pryor Nelson, who executed the foregoing certificate of incorporation of Hiawassee River Power Company, and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this the last day of July, 1914.

[OFFICIAL SEAL.]

J. E. KEENER,
Deputy Clerk Superior Court, Cherokee County.

Filed July 13, 1914. J. Bryan Grimes, Secretary of State.

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached (seven sheets) to be a true copy of the certificate of Incorporation of Hiawassee River Power Company, and the probate thereon, as the same was taken from and compared with the original filed in this office on the 13th day of July, A. D., 1914.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 15th day of July, in the year of our Lord 1914.

J. BRYAN GRIMES,
Secretary of State.

383 *Defendant's Exhibit No. 29.*

NORTH CAROLINA,
Cherokee County:

This indenture made and entered into this the 15th day of July, 1914, by and between H. F. Vandeventer of the City of Knoxville in the State of Tennessee, party of the first part, and the Hiawassee

River Power Company, a corporation organized and existing under and by virtue of the laws of North Carolina, party of the second part, witnesseth:

That the said party of the first part for and in consideration of the sum of Ten Dollars and other good and valuable considerations to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold and conveyed, and does hereby give, grant, bargain, sell and convey to the said Hiawassee River Power Company, its successors and assigns, all his right, title and interest in and to certain pieces or parcels of land lying and being in Cherokee County, North Carolina, along the Hiawassee River and bounded and more particularly described as follows:

(1) Grant No. 7296, Entry No. 7811. Lying on the North side of Hiawassee River in District No. 5 in Beaverdam Township. Beginning on a locust on the North Bank of Hiawassee River, runs with an old line, N. 22 E. 90 poles to a red oak, a corner of said line; thence N. 65 E. 68 poles to a post oak on Fowler's line; thence W. with said line 132½ poles to a hickory, corner of same; thence with Fowler's line S. 50 E. 75 poles to a post oak corner; thence S. 67 W. 14 poles to a poplar; thence S. 50 W. 118 poles to a white pine on the N. Bank of Hiawassee River; thence with the meanders of the River to the beginning, containing 38 acres, more or less.

(2) Lying on the North side of Hiawassee River in District No. 5 in Beaverdam Township. Beginning on a locust on the N. bank of Hiawassee River, runs N. 22 E. 90 poles to a red oak; thence N. 65 E. 68 poles to a post oak on Fowler's line; thence E. to a chestnut corner; thence down with the meanders of the ridge to a spring branch; thence down said branch to a water birch on the bank of the Hiawassee River; thence down the River to the beginning. Containing 75 acres, more or less.

The foregoing two tracts being the land conveyed to H. F. Vandeverter by Anderson Coleman et ux Lucinda by a deed of record in Cherokee County.

(3) Grant No. 2331, Tract No. 56 in District No. 8. Beginning on a white oak, the beginning corner of No. 55, runs N. 54 poles to a chestnut on the bank of Hiawassee River; thence up the river with its meanders to a spruce pine; thence S. 118 poles to a post oak; thence W. 142 poles to the beginning, containing 118 acres, more or less. Being the land conveyed to H. F. Vandeverter by W. J. Crain and others by a deed recorded in Cherokee County.

(4) Grant No. 1718, Entry No. 40, lying on the south side of Hiawassee River, District No. 8 in Shoal Creek Township. Beginning on an elm on the South Bank of Hiawassee River on Henry Reeses line of Tract No. 39, runs West about 180 poles to a post oak on John Allen's line; thence N. W. 20 poles to a maple; thence N. 60 poles to a white pine on the S. bank of Hiawassee River; thence up the river with its meanders to the beginning, containing 80 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeverter by W. A. Mashburn et ux by an instrument registered in Cherokee County in Book "27" of Deeds, page 427.

(5) Lying in District No. 5, Beaverdam Township on Hiawassee River. Beginning on a black gum on the N. bank of Hiawassee River, runs in a straight line to a red oak on the original line of said tract; thence East to a black gum on the Bank of Hiawassee River; thence with the meanders of the river to the beginning, containing 45 acres, more or less, being the land contracted to be conveyed to H. F. Vandeventer by Mary Rogers and others by an instrument registered in Cherokee County in Book "27" of Deeds, page 450.

(6) In District No. 5, beginning on a stake and black gum standing on the N. bank of Hiawassee River, S. W. corner of No. 262 runs S. 48 W. 252 poles to a dead black oak; thence S. 18 E. 17 poles to a hickory on the North bank of Hiawassee River; thence up the river with its meanders to the beginning, containing 100 acres, more or less, except that part of said tract sold to Adolphus Rogers. Being the land contracted to be conveyed to H. F. Vandeventer by Hugh Rogers et ux Elizabeth, by an instrument in Cherokee County.

(7) Grant No. 1650, Tract No. 22 in District No. 8. Beginning at a chestnut in the S. line of No. 21, 81 poles E. to a post oak, the N. W. corner of No. 21 and runs N. 148 poles to a cucumber on the bank of Hiawassee River; thence up, with the meanders of said river to a poplar and birch, the N. E. corner of No. 20; thence W. 119 poles, passing the beginning corner of tract No. 20 to the beginning being the land contracted to be conveyed to H. F. Vandeventer by O. F. Hunsucker et ux by an instrument registered in Cherokee County in Book "27" of Deeds, page 623.

(8) Lying in Beaverdam Township, District No. 5. Beginning on a beech on the N. Bank of Hiawassee River, Burgesses upper corner, runs N. 35 E. 1855 feet to a pine (down) in an old field, Burgesses corner; thence S. 35 E. 219 feet to a pine on a ridge, Burgesses corner; thence N. 45 E. 1075 feet to a stake on Rogers' line; thence with Rogers' line S. 18 E. 2365 feet to a hickory (down), on the N. bank of Hiawassee River, Rogers' corner; thence down the river with its meanders 4310 feet to the beginning, containing 100 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeventer by Joseph Whitener et ux by a contract recorded in Cherokee County in Book 28 of Deeds at page 162.

(9) The lands situated in Shoal Creek Township and also the Nelson-Hamby lands; also the P. E. Nelson land lying between the Nelson-Hamby and Nelson-Roberson land, and between the highest point of the main ridge south of the Hiawassee River and said river; also the Jake Roberson-Nelson land between the main ridge and Hiawassee River; also the John H. Roberson land including all the is not overflowed or used in the construction and development of water power, waterworks, etc., said lands being more particularly described in deeds from Wm. Y. Westervelt et ux, to L. C. Hamby, John Roberson and P. E. Nelson, to which reference is made, being the lands contracted to be conveyed to H. F. Vandeventer by P. E. Nelson

son et ux. by an instrument recorded in Cherokee County in Book 28 of Deeds, page 196.

(10) Lying in Shoal Creek Township, District No. 8. Part of Tract No. 58. Beginning on a rock on a conditional line between Julius Reed and E. H. Nelson on the S. bank of Hiawassee River, runs up the mountain in an east direction with Nelson's line to Harrison McDonald's line; thence with said McDonald's line to the Crain or Lenoir line; thence N. to the River; thence with the meanders of the river to the beginning, containing 75 acres, more or less. Being the lands contracted to be conveyed to H. F. Vandeverter by Julius Reed et ux Martha by an instrument recorded in Cherokee County.

(11) Being part of tract No. 58 in District No. 8 in Shoal Creek Township. Beginning on a spruce pine, Crain's corner, runs up the river with its meanders about 75 rods to a rock on the bank of the river near the mouth of the second branch; thence a S. E. course up the ridge to Cal Nelson's conditional line W. to a stake in Crain's line; thence with Crain's line N. to the beginning, containing 22 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeverter by E. H. Nelson et ux. by an instrument recorded in Cherokee County.

(12) Beginning on a hickory on the N. bank of Hiawassee River corner of No. 150 and No. 4519, runs down the river with its meanders N. 59 degrees and 30 minutes W. 235 feet; thence N. 52 degrees 10 minutes W. 295 feet; thence N. 47 degrees 30 minutes W. 210 feet to the end of a rock wall on the N. bank of said river; thence N. 43 degrees 30 minutes E. 235 feet to a stake by a large rock in a field; thence S. 79 E. 605 feet to a stake and rock on the top of a ridge, conditional line; thence N. 38 degrees 15 minutes E. 745 feet to a stake on the top of a ridge; thence N. 8 degrees 30 minutes W. 200 feet to four chestnuts on the top of the ridge; thence N. 48 degrees 30 minutes E. 200 feet to a small oak on top of the ridge; thence N. 39 degrees 15 minutes E. 170 feet to a small oak on the top of the ridge; thence N. 8 degrees 15 minutes E. 80 feet to a stake on the top of the ridge in Anderson's line; thence S. 35 E. 505 feet to a black oak on a hill side; thence N. 50 E. 845 feet to a white oak and hickory near a branch; thence S. 35 E. crossing a branch at 50 feet, 1330 feet to a pine; thence S. 80 W. 82 feet to a stake and pointer; thence S. 30 W. 745 feet to a stooping white oak on the point of the ridge; thence S. 17 E. 230 feet to a stake and pointer on the point of a ridge; thence S. 65 E. 910 feet to a post and pointers on top of the ridge; thence N. 56 E. 670 feet to a Spanish oak near the top of a ridge; thence S. 82 E. 240 feet to a pine near the top of a ridge; thence N. 62 E. 655 feet to a pine in a hollow; thence N. 42 E. 520 feet to a small black oak on top of a ridge; thence N. 18 W. 520 feet to a large pine on top of a ridge; thence N. 89 E. 525 feet to a rock in a field near a gate; thence S. 45 E. 100 feet to a rock on the bank of a branch; thence down the branch with its meanders S. 36 E. 200 feet; S. 62 deg. 30 min. W. 135 feet, E. 39 deg. 30 min. E. 85 feet; S. 3 deg. 30 min. E. 200 feet; S. 44 W. 100 feet; S. 13 W. 20 feet to a white oak on the bank of

a branch; thence S. 83 E. 210 feet to a locust on the N. bank of Hiawassee River; thence down the river with its meanders 9870 feet to the beginning. Containing $25\frac{3}{4}$ acres. Being part of tracts 13 and others and being the land contracted to be conveyed to H. F. Vandeventer by H. T. Hamby et ux and others by an instrument recorded in Cherokee County in Book 28, page 162.

(13) Tract No. 26, District No. 8, Cherokee County. Beginning on a black oak a corner of No. 25, runs S. 22 poles to a red oak on the line of No. 19; thence 160 poles to a pine; thence N. 166 poles to a pine on the bank of Hiawassee River; thence with the meanders of the river to a maple, the N. W. corner of No. 25; thence S. with the line of No. 25, 56 poles to the beginning, containing 167 acres more or less. Being the lands contracted to be conveyed to H. F. Vandeventer by W. A. Fair et ux by an instrument recorded in Cherokee County in Book 28 of Deeds, page 257.

(14) Lying in Shoal Creek Township, District No. 8. Beginning on a pine, corner of W. A. Fair's land, runs with the meanders of the ridge in a North direction with Pink Pain's land to a black oak corner; thence N. with Louisa Stiles' line to Jess Carroll's rock corner; the same course with Carroll's line to a maple on the S. bank of the river; thence down the river with its meanders to the mouth of dog branch; thence a south course up the branch to a white oak corner; thence a straight line S. and with the ridge to the beginning, containing 100 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeventer by Q. W. Stiles et ux by an instrument recorded in Cherokee County in Book 28 of Deeds, page 631.

(15) Lying in District No. 5, Beaverdam Township. Beginning on the N. bank of Hiawassee River on a water birch, runs with the spring branch an E. course to a pine on the top of a ridge on a conditional line between Levi B. Mashburn and then a S. course, E. down the ridge, a conditional line between said Levi B. Mashburn to a beech near the road and branch that J. M. Martin lives on, the S. boundary line of tract No. 504; thence with that line 15 degrees E. to a black oak; thence with the old line to Dr. S. S. Ball's line; thence a N. course back to a black oak, corner of Dr. S. S. Ball; thence S. 75 W. 110 poles to a Spanish oak on the bank of said river; thence down the river with its meanders to the beginning, containing 90 acres, more or less.

(16) Adjoining the immediately foregoing tract. Beginning on a water birch, runs with a conditional line to the top of the first ridge to a pine corner; thence with a conditional line to a chestnut corner; thence straight across the hollow to James Danner's old line; thence with the same line to the beginning, containing 3 acres, more or less. Being the two tracts of land contracted to be conveyed to H. F. Vandeventer by W. M. Hyatt et ux by an instrument registered in Cherokee County in Book 28 of Deeds, page 218.

(17) Beginning on a white pine the N. bank of Hiawassee River near the mouth of a branch, runs N. 25 E. 64 poles to a chestnut on the line of No. 7586; thence S. 85 E. 175 poles to a black oak; thence N. 5 E. to a red oak, A. William's corner; thence S. 20 E. 100 poles

to a post oak; thence S. 45 W. 60 poles to a pine in a former line; thence N. 35 W. 14 poles to a pine, an old corner; thence S. 35 W. 16 poles to a beech on the N. bank of Hiawassee River; thence down said river with its meanders to the beginning, containing 100 acres, more or less. Lying in District No. 5 and being the lands conveyed to H. F. Vandeventer by J. A. Burgess and others by a deed registered in Cherokee County in Book 28 of Deeds at page 211.

(18) Grant No. 1687, Tract No. 34, District No. 8. Beginning on a post oak, the N. W. corner of No. 33, runs W. 22 poles to a beech in a branch; thence N. 124 poles to a cucumber on the S. bank of a large creek; thence E. 46 poles, crossing the creek at 12 poles, to the river to a white pine; thence up the river with its meanders to a spruce pine in the line of No. 33; thence W. 110 poles to the beginning, containing 70 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeventer by W. H. Johnson et ux by an instrument recorded in Cherokee County in Book 28 of Deeds, at page 117.

(19) Beginning on an old dead poplar on the W. bank of Hiawassee River, runs 15 poles up the branch to a stump; thence running straight to a pine through a westwardly course; thence S. with Wm. McClure's line to W. D. Hogshed's corner on top of the hill; thence S. with Hogshed's line to a pine on the bank of the road; thence a S. E. course to an iron wood tree on the bank of Cootley Creek; thence straight forward in the same direction to a holly on the bank of a branch; thence a N. E. course with an old road, passing a mill, 5 rods to a stake; thence N. W. to an apple tree; thence a S. E. course to a willow on Hiawassee River; thence with the meanders of the river to the beginning, containing 60 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeventer by W. K. Johnson et ux by an instrument recorded in Cherokee County, in Book 28 of Deeds, page 116.

(20) A tract of land known as the Staleup land and more particularly described in deed from A. B. Dickey et ux to W. S. Roberts, recorded in Cherokee County in Book 13 of Deeds, pp. 309 to 312. Being the land contracted to be conveyed to H. F. Vandeventer by W. S. Roberts et ux by an instrument of record in Cherokee County.

(21) Tract No. 23 in Dist. No. 8 in Shoal Creek Township. Beginning on a bush on the bank of Hiawassee River, runs up said river with its meanders to a sycamore corner, lot known as Sharp bluff; thence S. with the line of same to a rock on top of a ridge on said line; thence a N. W. course with the road to John Green's line on the top of said ridge; thence down a ridge a N. E. course to the beginning, containing 60 acres, more or less. Being the land contracted to be conveyed to H. F. Vandeventer by Jacob Davis et ux by an instrument recorded in Cherokee County in Book 27 of Deeds, at page 624.

(22) Beginning on a willow, corner of Sallie Hartness, on the bank of Hiawassee River, runs up the river 18 poles to a service; thence S. 83 E. 60 poles to a double white oak on the point of a

ridge; thence S. 50 E. 58 poles cornering in Florence Moore's line on a post oak; thence S. 48 W. 21 poles to a walnut on the top of a mountain, corner of Florence Moore; thence N. 54 W. 46 poles to a Spanish oak corner of Sallie Hartness; thence N. 75½ W. 53 poles passing through the old spring to the beginning, containing 15½ acres, more or less.

(23) Grant No. 3388, Tract No. 3. Beginning on a water oak on the W. bank of Nottley River, the fifth corner of No. 2, runs S. 180 poles to a black oak; thence E. 110 poles to a poplar on the bank of Nottley River; thence down the river with its meanders to the beginning, containing 74 acres, more or less.

(24) Grant No. 3386, Tract No. 4. Beginning on a beech on the S. bank of Hiawassee River, the fourth corner of No. 2, runs S. 180 poles to a black oak on the E. side of a ridge; thence E. 140 poles to a black oak; thence N. 180 poles to a water oak on the W. bank of Nottley River; thence W. 140 poles to the beginning, containing 157 acres, more or less. The last three tracts being the lands conveyed to H. F. Vandeventer by Victoria James by deeds of record in Cherokee County.

To have and to hold all the right, title and interest of the said H. F. Vandeventer in and to the aforesaid tracts or parcels of land to wit: the said Hiawassee River Power Company, its successors and assigns forever.

In testimony whereof the said H. F. Vandeventer, party of the first part has hereunto set his hand and affixed his seal this the day and year first above written.

H. F. VANDEVENTER. [SEAL.]

NORTH CAROLINA,

Cherokee County:

Personally appeared before me this day H. F. Vandeventer who acknowledged the due execution by him of the foregoing instrument for the purposes therein expressed. Therefore let the instrument with this certificate be registered.

This the 15th day of July, 1914.

A. A. FAIN,
Clerk Superior Court.

Filed for registration on the 15th day of July, 1914, at 2 o'clock P. M., and registered in the office of the Register of Deeds for Cherokee County, in Book No. 28 of Deeds, pages 365 to 370, this 18th day of July, 1914.

A. L. JOHNSON,
Register of Deeds for Cherokee County.

Defendant's Exhibit No. 32.

Murphy, N. C., July 15th, 1914.

A meeting of the subscribers to the Articles of Incorporation of the Hiawassee River Power Company was duly held at Murphy, N. C., in the office of Dillard, Hill & Axley on the above date. Notice of the call for said meeting was waived by all the subscribers. There were present at this meeting Hugh F. Vandeventer, subscriber for 980 shares of stock; John E. Fain who subscribed 10 shares, and P. E. Nelson who subscribed 10 shares. The meeting was called to order by H. F. Vandeventer, who stated the object for which it had been called. On motion of John E. Fain, H. F. Vandeventer was elected Chairman and P. E. Nelson Secretary. P. E. Nelson announced that he had assigned one of his 10 shares to C. Vandeventer, one to Horace Vandeventer, one to John H. Dillard and one to F. F. Vandeventer, and asked that the certificates for these shares be issued to the parties entitled.

The subscribers then considered the charter and on motion, duly seconded, the same was accepted by unanimous vote. H. F. Vandeventer then tendered the Corporation a deed conveying to it in fee simple all the lands situate on the Hiawassee River in Cherokee County which are necessary for the purposes of the Company and so which he had theretofore acquired title, and all his right, title and interest in and to certain other lands so situate and so necessary for the purposes of said Company, which he had theretofore acquired by virtue of certain written contracts, and all maps, surveys, engineer's reports, etc., which he had prepared, in payment for his subscription to the capital stock of the Corporation.

On motion of John E. Fain, duly seconded, it was voted unanimously by all the subscribers, except H. F. Vandeventer, to accept said lands, maps, surveys, engineer's reports, etc., in payment for 980 shares of the capital stock of the Corporation, and it was voted as the honest judgment of the said subscribers that these were well and fairly worth the sum of \$98,000.00. The subscriptions of John E. Fain and P. E. Nelson each for 10 shares of the par value of \$100.00 each, were paid in cash.

Thereupon, the Chairman announced that the amount of capital stock required by the charter having been paid in, the Corporation was authorized to commence business and that the election of directors was in order. It was determined that the Board of Directors should at present consist of four directors with the right to increase the number to seven, and an election was gone into which resulted in the choice of H. F. Vandeventer, John E. Fain, John H. Dillard and P. E. Nelson as such directors, leaving three to be elected later.

On motion, P. E. Nelson was appointed as a committee of one to have prepared and presented to the next meeting of the stockholders a set of by-laws for their consideration.

Thereupon the meeting adjourned subject to the call of the President to be elected by the directors.

(Signed)

H. F. VANDEVENTER, *Chairman.*
P. E. NELSON, *Sec.*

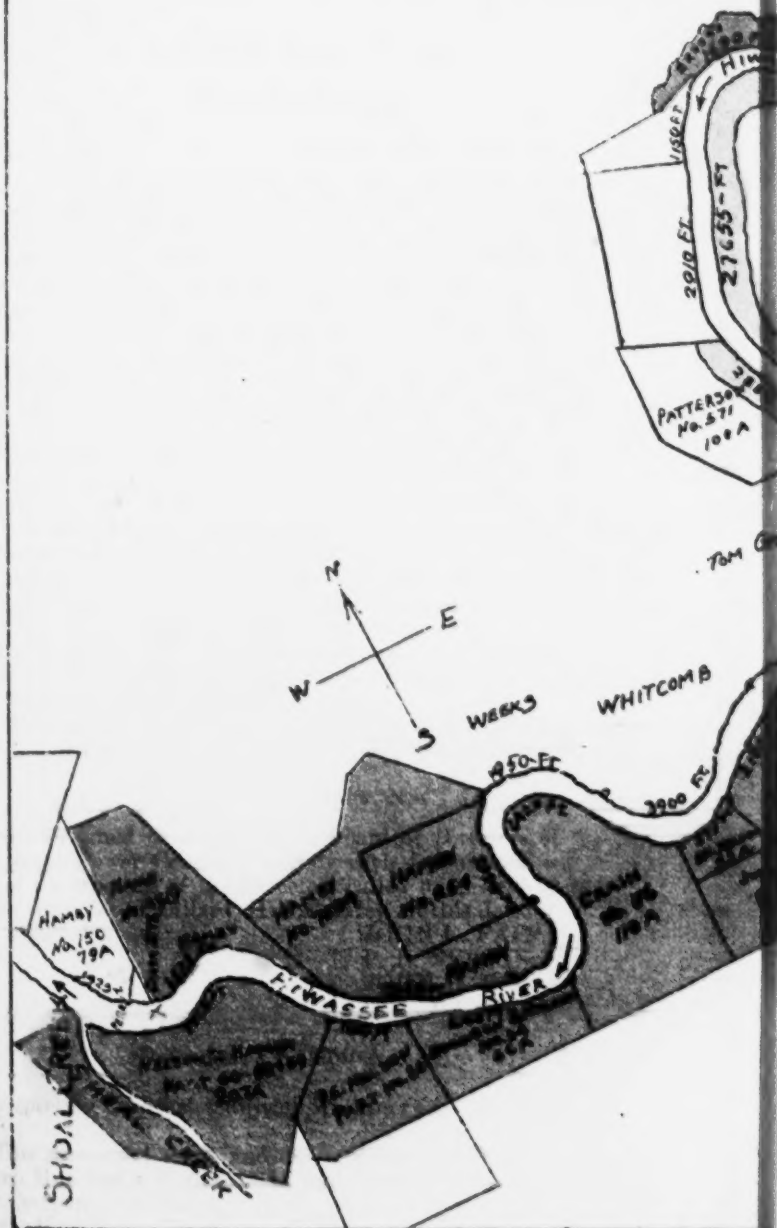
Murphy, N. C., July 15th, 1914.

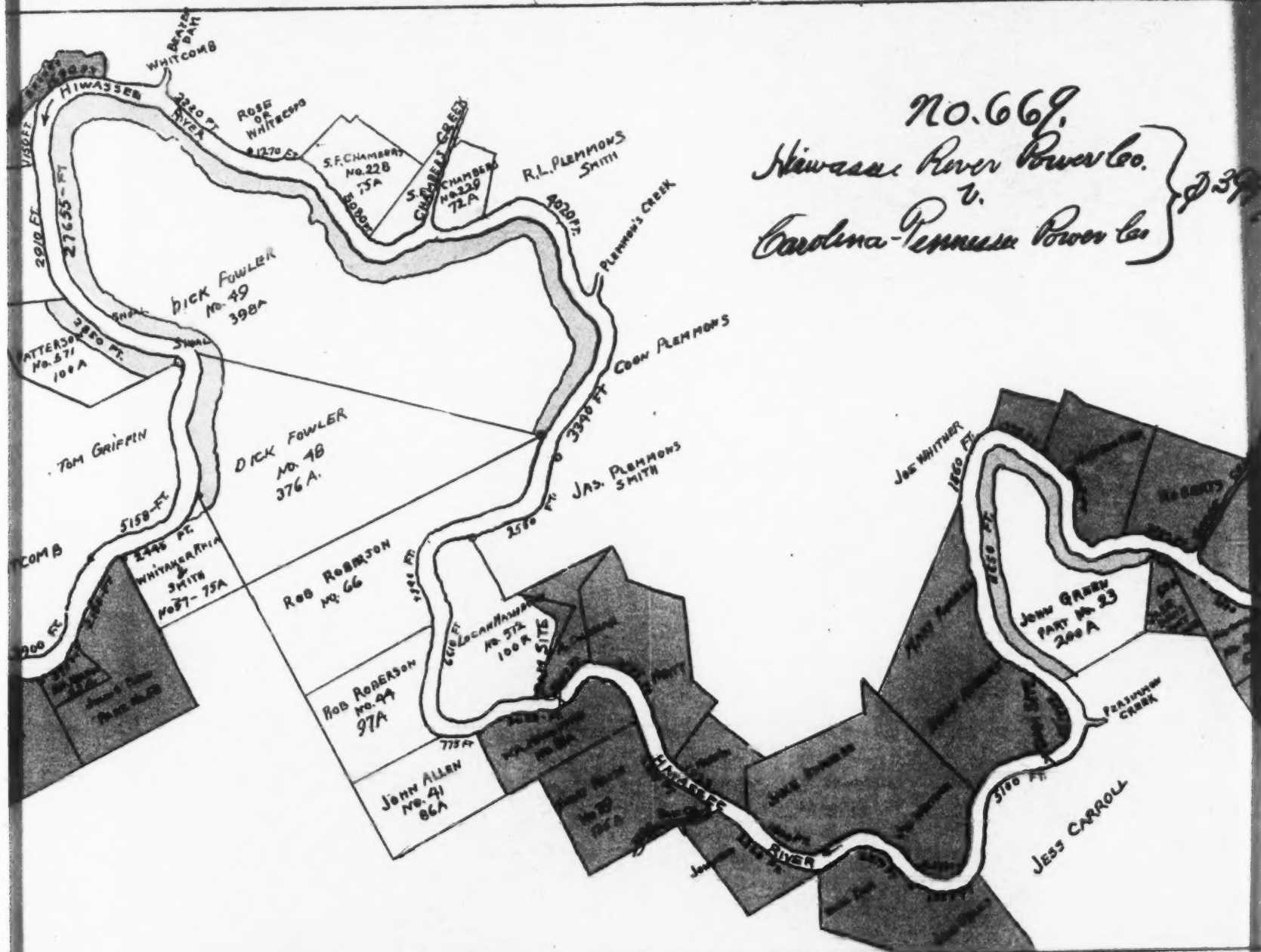
The undersigned incorporators of the Hiawassee River Power Company hereby each for himself waives any notice of the meeting of the incorporators called to be held in Murphy, N. C., in the office of Dillard, Hill & Axley on this date.

(Signed)

H. F. VANDEVENTER.
JOHN E. FAIN.
P. E. NELSON.

(Here follows map marked p. 394½.)



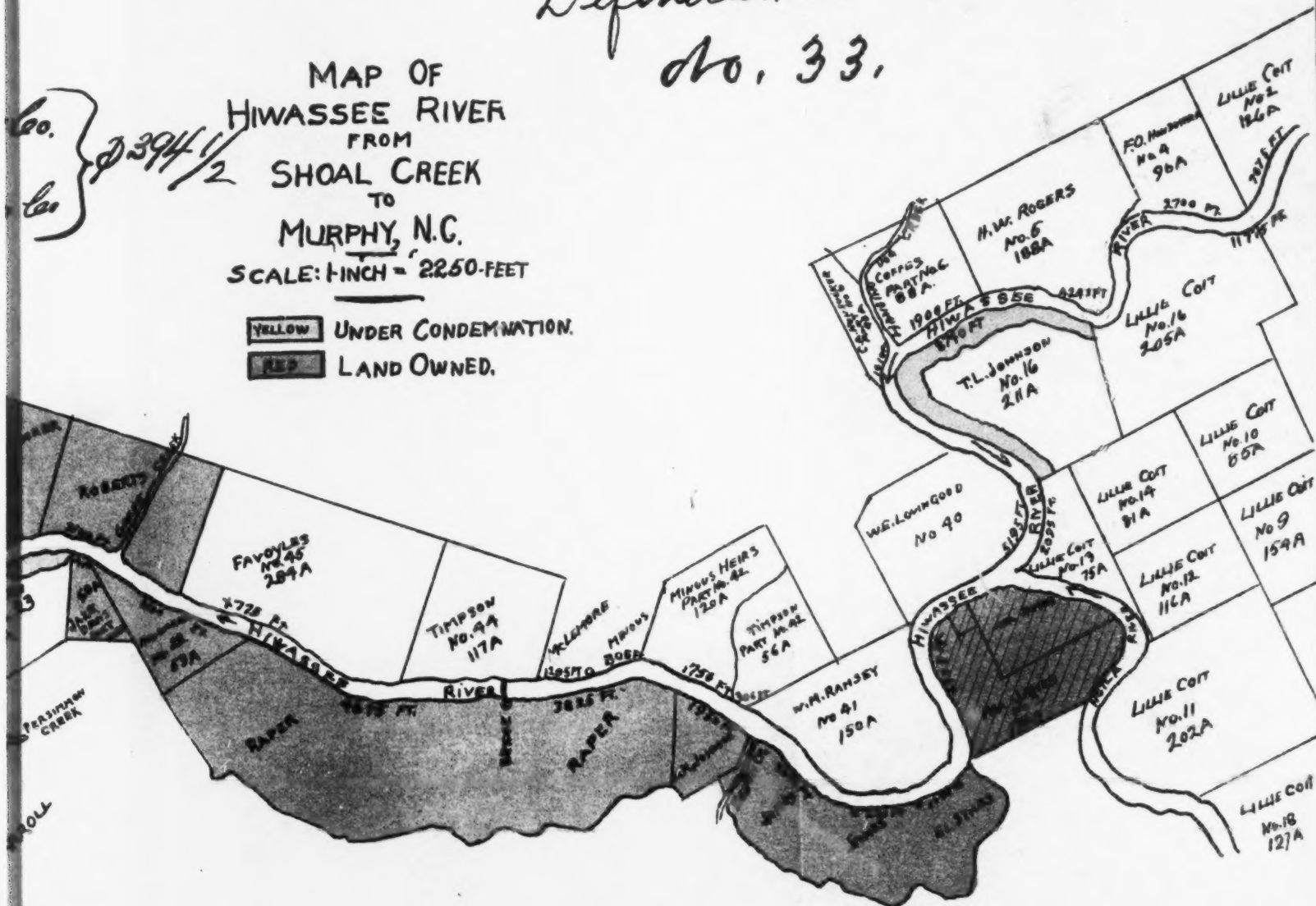


Defendant Exhibit No. 33.

MAP OF
HIWASSEE RIVER
FROM
SHOAL CREEK
TO
MURPHY, N.C.

SCALE: 1 INCH = 2250 FEET

YELLOW UNDER CONDEMNATION.
RED LAND OWNED.



REDUCED COPY BY B.M. HALL & SON, ENGINEERS ATLANTA, GA.



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Defendant's Exhibit No. 33.

Directors' Meeting.

Murphy, N. C., July 15th, 1914.

At a meeting of the Directors of the Hiawassee River Power Company, duly called and held at Murphy, N. C., on the 15th day of July, 1914, notice of which was waived, there were present H. F. Vandeventer, John E. Fain, John H. Dillard and P. E. Nelson. Upon motion John E. Fain was called to the Chair and P. E. Nelson was elected temporary Secretary. The Chairman announced that all of the Board of Directors were present and that the election of officers was in order. On motion, duly seconded, H. F. Vandeventer was elected President and P. E. Nelson Secretary & Treasurer. The election of a Vice President was postponed until next meeting. On motion it was resolved that a majority of the Board of Directors should constitute a quorum and be authorized to transact business.

It being stated that it was deemed expedient to take prompt steps to acquire so much of the lands of Alvin S. Farrow or Dick Fowler as are necessary for the purpose of a dam which the Company proposes to construct at the Nelson-Hamby site on Hiawassee River, by condemnation, all efforts to acquire the same by purchase having failed, and same being required for this purpose, the President was instructed to begin such proceedings at once.

And on motion, duly seconded and passed, the President was authorized to institute similar proceedings to acquire any other land which cannot be purchased at a fair price.

(Signed)

JOHN E. FAIN, *Chairman.*

(Signed)

P. E. NELSON, *Secretary.*

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Murphy, N. C., July 15th, 1914.

The undersigned members of the Board of Directors of the Hiawassee River Power Company hereby each for himself waives any notice of the meeting of the Directors called to be held in Murphy, N. C., in the office of Dillard, Hill & Axley on this date.

(Signed)

JOHN E. FAIN.

P. E. NELSON.

JOHN H. DILLARD.

H. F. VANDEVENTER.

Defendant's Exhibit No. 34.

Prospecting Contract, Sullivan Machinery Co., Chicago, Ill.

1. This agreement made and entered into this 30th day of July Nineteen Hundred & Fourteen, by and between the Hiawassee River Power Company, of Murphy, N. C., party of the first part and the Sullivan Machinery Company, of Chicago, Illinois, party of the second part, witnesseth:

2. In consideration of certain payments herein agreed to be made by the said first party to the said second party, the said second party agrees to drill, sink or prospect with a diamond core drill¹ or drills in the vicinity of Turtletown, Tenn., at sites to be selected by the party of the first part, to a depth not to exceed 200 feet in any one hole and subject to certain conditions hereinafter mentioned.

3. The said second party agrees to use for the above described work, one or more diamond core drills and men skilled in operating same, and to furnish only to such persons as the said first party may designate by written order, all core taken out of said prospect holes.

Size of core to be approximately 15-16 inches in diameter.
397 The said first party shall provide suitable boxes if it is desired to save the core, and if it also desires, may have a man at the drill at all times to remove and take charge of said core. No information whatever regarding the records and results of this prospecting is to be given to any other party without the written consent of the said first party.

4. The said first party agrees to pay the actual cost of doing the herein described prospecting and in addition to the cost, the sum of Twenty Dollars (\$20.00) per day for each and every day, (excepting Sundays, unless worked) from date of shipment from Chicago, Ill., until date of shipment from site when the work under this agreement is completed. This cost will include labor, diamond loss, hauling, supplies, renewals, freight from Chicago, Ill., to the location of the herein described work and return, also railroad fares and travelling expenses of the second party's crews from their starting points to the location of the work and return and all other necessary expenditures.

The word "labor" as used in this paragraph shall be considered to mean the wages to the crews from the date of departure from their starting points until the date of arrival at their destination on their return at the termination of their services.

It is further agreed that should the party of the first part have an office in the vicinity where this work is to be carried out, for the purpose of purchasing material and carrying on construction work, that whenever practicable or desirable, expenditures shall be paid directly by the party of the first part. It is further agreed that the cost of drilling outfit and the supervision or direction of the operations by the party of the second part, from Chicago, shall not be included in the cost of the work.

5. The crews will consist of one foreman at a salary of
398 \$150.00 per month and two runners for each outfit, at a salary of \$100.00 per month, each, and two or more helpers, as may be necessary to carry on the work at local rates. The foreman and runners will receive their traveling expenses to and from the work and salary while traveling as herein provided.

6. As soon as possible after the end of each month, the party of the second part shall present a detailed statement of expenditures and charges for the previous month which shall become due immediately and shall be paid on or before the 20th of the month following that in which the expenditures were made.

7. The party of the second part agrees to commence the herein

described work within — days after it has been notified of the acceptance of this agreement and to bring the work to completion as rapidly as possible under the conditions.

8. The party of the first part may terminate this agreement at any time upon giving ten (10) days' notice in writing to the Chicago office of the party of the second part.

In witness whereof the parties hereto have set their hand and seal.

(Signed) SULLIVAN MACHINERY COMPANY,

By E. L. THOMAS,

(Signed) HIAWASSEE RIVER POWER CO.,

By H. F. VANDEVENTER, *Pt.*

Clerk's Certificate.

NORTH CAROLINA,
Cherokee County:

In the Superior Court.

I, A. A. Fain, Clerk of the Superior Court of Cherokee County hereby certify that the foregoing is a true and perfect transcript of the record on appeal in the case of Carolina-Tennessee Power Company vs. Hiawassee River Power Company, including case on appeal, exceptions, assignments of error and exhibits.

Witness my hand and seal, this the 19 day of Nov., 1917.

A. A. FAIN,

Clerk Superior Court.

Docket Entries Spring Term, 1916.

No. 577 (Plaintiff's Appeal): Docketed October 21, 1915; Argued December 16, 1915. Advisari. Opinion by Walker, J. Filed March 29, 1916.

No. 580 (Defendant's Appeal): Docketed November 19, 1915; Argued December 16, 1915. Advisari. Opinion by Walker, J. Filed March 29, 1916.

Supreme Court of North Carolina, Spring Term, 1916,
Cherokee Co.

Nos. 577 and 580.

CAROLINA-TENNESSEE POWER COMPANY

v.

HIAWASSEE RIVER POWER COMPANY.

Civil action tried before Cline, J., and a jury at March-April Term, 1915, of Cherokee Superior Court.

The plaintiff was incorporated by a special act of the General Assembly, ratified on February 16, 1909, it being Private Laws of 1909, Ch. 76, and was organized on May 25, 1909. It was given by its charter numerous and comprehensive powers and capacities, and among others, the right "to carry on any and all business in any wise appertaining or connected with the manufacturing and generation, distributing and furnishing or electricity, compressed air, gas, or steam for light, heat and power purposes, including the transacting and conducting of any and all business in which electricity, compressed air, gas or steam is now or may be hereafter utilized, and all matters incidental or necessary to the distribution of light, heat and power; to manufacture and repair, sell and deal in any and all necessary appliances and machinery, used, or which may be acquired or deemed advisable for or in connection with the utilizing of electricity, compressed air, gas or steam, or in any wise appertaining thereto or connected therewith; to purchase, acquire, own, use, lease, let and furnish any and all kinds of machinery, apparatus and appliances; to purchase, acquire, own, hold, improve, let, lease, operate and maintain water rights and privileges and water powers; to construct, acquire, build and operate, maintain and lease dams, canals, ditches, flumes and pipe lines for the conducting of water, and creating power; to acquire by purchase, condemnation or other proper methods, the right to use, employ and divert the water flowing and running in any stream or water course, not navigable in North Carolina, which may be necessary to the exercise of any of the powers of a public or quasi public character herein granted to the said corporation; and whenever it shall be necessary to divert the water from any such stream or water course to be used for any of the purposes herein provided, the said corporation shall have the right to have the value of the said water so to be diverted, and the land so to be used over which it shall be banked, ponded or conducted, or condemned, and the value thereof assessed in the manner hereinafter provided for the condemnation and valuation of land and other property; to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to or expedient for the protection or benefit of the corporation, either as holder of, or interested in any property, and in general to carry on any business whether manufacturing, mining or otherwise." It is further provided in section 8 of the charter as follows: "It shall be lawful for the president and directors, their agents, superintendents, engineers and others in their employ, to enter at all times upon all lands or water for the purpose of exploring or surveying the lands and water required by said company for the location of any of its works, or for the conducting of the business, or any part of said business, hereinafter authorized, in paragraphs a, b, c, and d of section five, and of locating said works, doing no unnecessary damage to private property; and when the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the

County in which the said land lies, then it shall be lawful for the said company, by its officers, agents, engineers, superintendents, contractors and others in its employ, to enter upon, take possession of, have, hold, use and excavate and fill in such lands, and to erect all the necessary and suitable structures for the erection, completion, repairing and operating of said works, subject to such compensation as is hereinafter provided: Provided, however, that said company

shall not enter upon or break ground upon the premises, except for the purposes of surveying, without the consent of the owner until such owner's damages are agreed upon between such owner and said company, or ascertained by the method hereinafter provided, and such damages has been paid to such owner; and provided further, that such locating of its works and filing its surveys in the office of the Clerk of the Superior Court shall not preclude said company from making from time to time, other location of works and filing surveys of the same as its business and its development require; and whenever any land for the location of a dam or dams, lake or lakes or a canal or canals, or for ponding water, or any other lands or rights-of-way may be required by said company for the purpose of constructing and operating its railroads, or railways, street railways or motor lines, telegraph or telephone lines, or other works, or for the conducting of the business herein authorized, or any part of said business, and the said company cannot agree with the owner thereof for the purchase of the same, the same may be condemned and taken and appropriated by said company at a valuation of three commissioners, or a majority of them, to be appointed by the Clerk of the Superior Court of the county in which the land is to be condemned lies, or the clerk of the adjoining county if the land lies in more than one county."

The court submitted the issues to the jury which with the answers thereto are as follows: "1. Did the plaintiff prior to August 21st, 1914, survey, stake out and adopt the locations for its dams, reservoirs and public works on the Hiawassee River as alleged in the complaint and as indicated on the map offered in evidence? Answer. Yes. 2. If so, were the plaintiffs' said locations lying on August 21st, 1914, in a state of abandonment? Answer. No they did not."

The Court then proceeded to find in detail certain facts, and in order to get a fair and full understanding of the case, as now presented, they are here set forth: "In this case, the Court deeming it necessary and proper that the facts should be found by the Court upon the evidence, in addition to the findings of the jury, by reason of the nature of the case and the relief sought herein, after due consideration of the whole evidence, finds the following facts; That the plaintiff, the Carolina-Tennessee Power Company, was chartered by an Act of the General Assembly, of North Carolina, being Chapter 76 of the Private Laws of 1909; that subsequently, to-wit, on the 25th day of May, 1909, a meeting was held at Murphy, North Carolina, at which the charter was accepted, the Company organized thereunder, by-laws duly adopted for the government of the corporation, and officers and directors

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elected, and the meeting of its Directors was held on the 28th day of May, 1909. That some time in July, 1909, a contract was entered into with the Ambursend Hydraulic Company of Boston, Mass., looking to and providing for a survey of the water power and lands adjacent to the streams at the point on the Hiawassee River in Cherokee County which is mentioned in the complaint. That about that time, or perhaps before, this Company sent T. H. Verdell, an expert civil engineer of the State of Georgia, who went upon the ground in the spring of 1909, made surveys of the lands from about the state line between North Carolina and Tennessee upon the Hiawassee River to and about a half a mile up the Notla River where he based his surveys and ran his contour of lines upon a proposed dam erection near the state line, of a height of 150 feet, and the second dam development near the mouth of Beaverdam Creek on said river on a height of 150 feet, the surveys altogether including an actual distance following the river, of about 2 $\frac{1}{2}$ miles. That he laid out the contour lines, taking all the necessary measurements to the two dams 150 feet each in height, located the lines upon the ground, clearing out the undergrowth at some places, where necessary, and by setting stakes from point to point along these lines of a reasonably permanent character, with the numbers and markings thereon to indicate their purpose; and the Court finds as a fact, as found by the jury, that the plaintiff, for which this and subsequent work was done, did survey and stake out locations for its dams, reservoirs and public works on this river, as alleged. It finds that Mr. Verdell made reports of the two basins, called the upper and lower, and filed the same with his maps, the last one being sent in about the 18th of September, 1909, same was received by the plaintiff, and copies of his maps made and same were subsequently used for the further purposes of the company in

405 prosecution of this proposed development

The Court finds further that plaintiff and those under contract with it, procured Wm. H. Burr, expert civil engineer of high reputation, to come upon the ground about July, 1910, for an examination of the proposed properties and a checking up of the work of Mr. Verdell, and a report thereon, and that he filed a favorable report of the properties of the proposed development on the 10th of August, 1910, covering the same ground from the State line to the mouth of and up to Notla River. That the plaintiff took title to some of the land lying upon this stream, and contracts for others from various land owners during the year 1910, made options in 1911, payments in 1912, and that Mr. Elton F. Smith was upon the ground in 1910 until he died in March, 1911, and Mr. George E. Smith was upon the ground in the same year, and in 1912, started some condemnation proceedings, and made other payments upon its contract later on, the total expenditures made by and in behalf of the plaintiff in this and other prospects amounting approximately to \$92,000.00.

The Court further finds that with the aforesaid maps and other maps which were made, in connection with the minutes of the meetings of the stockholders and directors, that the plaintiff did adopt

the locations mentioned in the complaint, and in the answer to the first issue by the jury in the same manner as found by the jury.

The Court further finds that Mr. Ketcham and others who had the enterprise in charge in 1910, '11 and '12, were unable properly to finance the undertaking so as to bring about the development, and that Mr. Ketcham sought and found in 1912 Mr. W. V. N. Powellson, who in 1913, about June, made himself some examination of the dam sites and other properties, he being an expert hydraulic and electrical engineer of well known reputation. That in that year he sent others of his own surveyors upon the land to check up the markings and the location of Mr. Verdell, who reported that they found them to be correct, and that in the year 1913, Mr. Powellson, with other associates, acquired all of these outstanding stocks and bonds of the Company and he is now its President. That he went on and made payments upon the contracts of the plaintiff and acquired some of the property in fee for it, the plaintiff
406 in this way taking deed as late as July 16th, 1914, for a large boundary of land which would be submerged at the purchase price of \$15,000.00.

The Court further finds that Mr. Edmund B. Norvell of Murphy has been active from time to time and from year to year in looking up the title of so called land owners along the stream with whom contracts had been made or options taken. That he passed some of them as good and some of them he held up the payments on as not being sufficient upon which to base a deed in fee.

As to the filing or depositing of the maps in the Clerk's office, as claimed by the plaintiff, there is some difference in the recollection of the witness as to what actually happened, but on it all the Court finds that the two maps offered in evidence showing the contour lines, and giving other information about this property, were deposited for the purpose of filing, and so filed in the Clerk's office by Mr. George E. Smith in the presence of Mr. Norvell on the 21st of June, 1911; that they were taken out again by Mr. Norvell on the 28th of June, returned by Mr. Smith to the office about a week later, and subsequently taken out again by Mr. Norvell who retained them in his office for use, in reference, there until July, 1914.

That this action was begun on the 21st day of August, 1914, and on the 13th day of July, 1914, the defendant company filed in the office of the Secretary of State its articles of incorporation upon which a charter was issued and so certified and sent to this county by the Secretary of State on the 15th day of July, 1914, and the same was recorded in the office of the Superior Court of this county on the 16th day of July, 1914. That immediately thereupon, the defendant instituted certain condemnation proceedings against certain claimants to, or owners of the land along this river, and in the scope of the locations of the plaintiff, declaring itself to be a public or quasi public organization chartered for the purpose of producing electric power to be sold to the public, and that it also acquired some lands upon the stream subsequently. At the time this litigation started, the plaintiff owned something like 26½ miles of the water front in fee, counting it on both banks, and had under

407 contract something like 11.96 miles, some 8 miles under proceedings for condemnation. That at the same time the defendant owned some four miles in fee, counting both sides of the stream, and had about ten and a fraction miles under contract upon which substantial payments had been made and were being made. Also about eleven miles under condemnation proceedings for which action had been begun. Of this last item some five miles was the river front of what is known as the Fowler land for which the plaintiff acquired a deed in fee on the 16th day of July, 1914, the day subsequent to the one on which condemnation proceedings was begun, and two miles of the frontage of what is known as the Green land to which the plaintiff had a title in fee at the time the defendant's proceedings and condemnation was begun.

The Court therefore finds as a fact that at no time since the incorporation and organization of the plaintiff up to the time of the bringing of this suit has the plaintiff abandoned its locations, this being the same finding as found by the jury under issues No. 2 treating it as a question of fact, if it is such."

Upon the verdict of the jury and the foregoing findings of fact the Court granted an injunction substantially as requested in the prayer of the complaint, which is as follows: Defendant is enjoined from: "(1) Purchasing or otherwise acquiring any other lands upon or along the banks of the Hiawassee River which are necessary for the works of the plaintiff as shown by marks upon the ground, or the survey thereof deposited in the office of the Clerk of the Superior Court of Cherokee County; (2) Prosecuting any actions heretofore commenced for the condemnation of any such lands or commencing hereafter any actions for the condemnation of any thereof; (3) Entering upon or constructing or placing any dams, reservoirs, power houses or other structures or machinery upon any such lands; and (4) Doing or committing acts or things which would interfere with the rights of the plaintiff, or the prosecution or completion of its plans and purposes as herein set forth, or which would annoy, delay or harass the plaintiff in carrying out such plans and purposes." The Court then added this clause: "In view

of the fact that the plaintiff has not prosecuted its purpose
408 and plans other than as hereinbefore set out in the findings of fact, that is to say, has neither built nor begun any dams or other structures upon the lands in question, the Court is of the opinion that the injunction ought not to be continued in perpetuity unless by its operations, activities and conduct subsequently, the plaintiff or its successors, can demonstrate the fact both of their willingness and ability to develop these water powers according to their plans and purposes, and that if within a reasonable time, to-wit, in two years or thereabouts, the defendant can show that the plaintiff is not carrying forward these plans in a substantial way and not actually engaged on the work, it ought to be permitted to move in this case, or take other steps as it may be advised, for a review and recall of this order of perpetual injunction."

Defendant, having duly reserved its exceptions, appealed to this Court.

Martin, Rollins and Wright for plaintiff. Zebulon Weaver, J. N. Moody and Alley & Leatherwood for defendant in 577.

Martin, Rollins and Wright for plaintiff. Dillard & Hill, E. R. Black, J. N. Moody, Felix Alley and Zeb Weaver for defendant in 580.

WALKER, J., after stating the case:

The defendant has raised several objections to granting relief in this action by injunction, as there has been no violation of or obstruction to plaintiff's rights. It is especially urged that by Revisal, section 1573, as amended by Public Laws of 1907, sec. 74, it is provided, with reference to the power of condemnation by Electric Companies, that the power given by this section (1573) shall not be used to interfere with any mill or power plant actually in process of construction, or in operation; and further that water powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken, and further, "the provisions in any special charters heretofore granted, in respect to the exercise of the right of eminent domain, which are in conflict herewith are hereby repealed." This statute was further amended by Public Laws of 1907, ch. 302. But after these acts were passed, the legislative charter of the plaintiff was granted, which, if not expressly, then by necessary intendment, gives the power to condemn water powers, especially those lying dormant and where two statutes conflict, the latter repeals the earlier one (*leges posteriores priores abrogant*). Cook on Corporations (7 Ed.), vol. 1, sec. 2; Clark & Marshal on Private Corporations (Ed. of 1903), sec. 127-b, at p. 383 and Ed. of 1901, pp. 107 and 174; Lewis Sutherland on Statutory Constr. Sec. 275; Wood v. Wellington, 30 N. Y. 218. It was insisted upon the argument that there should be express words of repeal in this act to suspend the operation of the general law and that none such are found therein. But this is not necessary. Where a later special law, local or restricted in its operation, is positively repugnant to the former law and not merely affirmative, cumulative or auxiliary, it repeals the older law by implication *pro tanto*, to the extent of such repugnancy within the limits to which the latter applies. McCavick v. State, 30 N. J. L., 510; Township of Harrison v. Supervisors, 117 Mich. 215. N. S. Railway Co. v. Ely, 95 N. C. 77. "The well settled rule of constructions, where contradictory laws come in question, is that the law general must yield to the law special." Noy's Maxims 19. State v. Clark, 25 N. J. L. 54. It was held in the following cases that the general law does not apply to a corporation organized under a special charter so far as the provisions of the latter conflict with the former. Clarkson v. H. R. Railroad Co., 49 N. Y. 455; Le Feore, 59 N. Y. 434; Hollis v. Drew etc. Seminary, 95 N. Y. 166, 173; and our cases virtually hold the same. Holloway v. Railroad Co., 85 N. C. 452, 455; N. S. Railway Co. v. Ely, *supra*; State v. Perkins, 141 N. C. 797; The subject is considered by the Chief Justice in the recent case of W. & Y. R. Railroad Co. v. Ferguson, 169

N. C. 70, where the same principle, as herein stated, was approved. Justice Hoke, in *Bramham v. City of Durham*, decided at the present term, goes fully into a discussion of the question, as to conflicts between the general law and special charters, holding that, where there is repugnance, the provisions of the special charter will prevail. The Code, sec. 701, was amended and became sec. 410 2566 of the Revisal, being confined in its operations to railroads. This was done in 1905, before the plaintiff received its charter in 1909. The Revisal of 1905, sec. 1129 recognizes the rule of construction we have stated above, as to the operative force of a special charter. *Power Co. v. Whitney*, 150 N. C. 31, does not apply. It presented a very different question. There the plaintiff's charter gave it a certain right of condemnation. This was expressly amended and limited by the general law at the same session, and afterwards its charter was re-enacted, "as amended," it was properly held that the charter of plaintiff was subject to the provisions of the general law. *Railroad Co. v. Railroad Co.*, 106 N. C. 16, was also a different kind of case. It was held there that the general law and the special reference to the N. C. Railroad Company's charter were in *pari materia* and both could have operation. Besides, the statutes have been amended since then as we have shown above and section 1159 of the Revisal allows full effect to the special charter. We cannot agree to the defendant's construction of the plaintiff's charter as we think it has a broader sweep than is there attributed to it.

It is further contended by defendant that plaintiff could not condemn property for public purposes, because it was authorized to engage in private business but we have held that position to be untenable in *Land Co. v. Traction Company*, 162 N. C. 314. It was there said by the Chief Justice: "The plaintiff contends that the Piedmont Traction Company cannot exercise the power of eminent domain, because, under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a quasi-public business. We think the law is clearly stated thus in 15 Cyc., 579. The fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses does not deprive it of the right of eminent domain in the prosecution of the public uses." *McIntosh v. Superior Court*, 56 Wash. 214; *Power Co. v. Webb*, 123 Tenn. 596. The company may purchase property for those uses which are not public and not resort to condemnation.

If it attempts to exceed those powers and franchises bestowed by its charter, or to exercise them in an unconstitutional or unwarranted manner, the State may restrain it by quo warranto or other proper proceeding. What should be the form of it, and how and by whom it may be invoked, matters not, as the remedy in some form is ample to prevent any excessive or illegal use of its chartered powers; *Land Co. v. Traction Co. supra*. It will be time enough for the defendant to complain when its legitimate interests are about to be invaded. The plaintiff has not sought, as yet, to condemn or appropriate any property for private uses.

But we think the Court erred in finding any facts additional to those found by the jury in their verdict. This is not a proceeding to condemn land as contended by the plaintiff, but a civil action to enjoin the defendant from interfering with plaintiff's previously acquired right and interest in certain water powers and lands and easements appurtenant thereto, and was tried upon issues and oral testimony, before a jury. It was not a case in which the presiding Judge could pass upon the evidence and find the facts or any material part of them. The whole matter was submitted to a jury and it was their province to pass upon all the essential issues, and to find the ultimate facts upon which the right of the respective parties depended. We know of no precedent for trying a case like this at the final hearing otherwise than by a jury, upon issues submitted to them, where the evidence is oral, unless the parties waive such a trial under the statute, and agree that the judge may find the facts. This court said, by Justice Hoke, in *Harvey v. Railroad Co.*, 153 N. C. at p. 574: "Ever since the amendment to the Constitution conferring jurisdiction over 'issues of fact and questions of fact to the same extent as exercised prior to the Constitution of 1868,' the construction of the amendment, in several well considered cases, has been that it does not embrace or apply to common law actions such as this, but only to suits which were exclusively cognizable in a court of equity, and to them only when the entire proof is written or documentary, and in all respects the same as it was when the court below passed upon it. *Runnion v. Ramsey*, 93 N. C. p. 411; *Worthy v. Shields*, 90 N. C. p. 92; *State and City of Greensboro v. Scott*, 84 N. C. p. 184; *Foushee v. Thompson & Pattershall*, 67 N. C. p. 453." It was not regular procedure, or according to the course and practice of the court, that the facts should be found by a divided tribunal, that is, court and jury. We, therefore, must hold that the facts, as found by the Judge, cannot be considered here. This was not the hearing of a motion for the continuance of a preliminary injunction, to the final hearing, but the final hearing itself and the judgment was necessarily one for a perpetual injunction, and the insertion of the clause reserving to the defendant the right to have reviewed or recalled "this perpetual injunction," as it is called in the judgment, by motion or otherwise, did not change its character in this respect. It still remained a final judgment and a perpetual injunction. In other words, the court at the final hearing, granted the relief prayed for in the complaint.

The defendant tendered certain issues, seven in number, which the court refused to submit, and in doing so, there was no error, as a comparison of these issues with those submitted by the court, will show that the latter substantially embrace every question or matter, which is covered by the former, with one exception hereinafter mentioned. The first of defendant's issues, leaving out the date, is the same as the first of those submitted by the Court, and the third, fourth, fifth and sixth of the defendant's issues practically contain no matter which is not presented by those of the court, but are rather special inquiries as to evidentiary facts bearing upon them. The seventh of defendant's issues is fully covered by the two issues sub-

mitted to the jury. The second issue of defendant will hereinafter be considered. Issues are sufficient when they submit to the jury inquiries as to all the essential matters or determinative facts involved in the controversy. *Zollicoffer v. Zollicoffer*, 168 N. C. 326; *Hatcher v. Dobbs*, 133 N. C. 239. The form of the issues is of little or no consequence, if those, which are submitted to the jury afford each party a fair chance to present his contention in the case, so far as it is pertinent to the controversy. *Carr v. Alexander*, 169 N. C. 655. Issues should be framed upon the pleadings and not upon the evidence. *Goins v. Indian Tr. School*, 169 N. C. 736.

The first issue, though, was not definite enough, in respect to the time when the plaintiff surveyed, staked out and adopted the locations for the sites of its dams, reservoirs and public works on the Hiawassee river. This is a case of conflicting claims to these water rights and easements and it was not sufficient to inquire if they had been acquired by the plaintiff prior to the bringing of this action. We are not required or permitted to examine the evidence to ascertain what the fact is, but it must appear in the issue itself as one which was found by the jury upon the evidence. The judgment is not based upon the evidence but upon the findings of the jury from the evidence. Besides we think there should be an issue as to whether a map of plaintiff's location was filed in the office of the Clerk of the Superior Court, and, if so, when it was done. This matter should not be left open for dispute between the parties hereafter, but should be settled by a special finding of the jury, in regard to it. Important rights demand it, and it becomes one of the vital questions of the case. It bears, as evidence, upon other questions, it is true, but has substantial weight and influence itself as a separate and independent fact. The defendant is here claiming the ownership of some of the properties to be affected by plaintiff's location, or an interest or right therein superior to the claim of the plaintiff and while the payment of damages to the land-owner may not be essential to the acquisition of a prior right or preferred location, between two rival claimants, the filing of the map is an act required to be performed by the claimant in connection with the location of his works and as a condition of his right to proceed further. If it is not required to be done for the purpose of determining the location and extent of plaintiff's claim, it is so intimately connected with it and is regarded as of such importance in the general scheme of appropriation as to call for a separate consideration and finding by the jury.

The general questions involved in this case were so thoroughly examined and considered in the carefully prepared opinion delivered by Justice Hoke for this Court in *Fayetteville Street Railway Co. v. A. & R. Railroad Co.*, 142 N. C. 423, that little, if anything need be said here upon the subject. It was there held that, in the absence of statutory regulations to the contrary, the prior right belongs to that Company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action," citing pertinent authorities, and among them *Lewis on Eminent Domain*, sec. 305, where it is said:

Where the conflict arises out of rival locations over the same property by companies acting, under general powers, that one is entitled to priority which is first in making a completed location over the property, and the relative dates of their organization or charters are immaterial." And again in the same section: "The making of a preliminary survey by an engineer of a railroad company never reported to the company, or acted upon, will not prevent another company from locating on the same line." It appears, therefore, that what is a proper location and what is authoritative corporate action in respect to it, so as to confer a prior or preferential right of occupancy or condemnation, are questions depending very much upon the facts, as disclosed by the evidence, under instructions by the court as to their legal sufficiency for the purpose of vesting the prior right in either one or the other of the competitors for it.

There are other exceptions, but not of sufficient importance to require any separate discussion of them. For the reasons stated there was error committed at the trial, in the respects indicated, and for which a new trial is ordered.

New trial.

Plaintiffs appeal.

WALKER, J.:

The decision in the defendant's appeal disposes also of the question in this appeal. As we have held that there should be a new trial, and as the judgment in favor of plaintiff has been set aside, there can be no amendment of it. The result in the other appeal really makes this appeal unnecessary and it is dismissed accordingly.

Appeal dismissed.

15 Supreme Court of North Carolina, Spring Term, 1916.

No. 577.

CAROLINA-TENNESSEE POWER COMPANY

vs.

HIAWASSEE RIVER POWER COMPANY.

Cherokee County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Cherokee County: Upon consideration whereof, it is considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable P. D. Walker, Justice, be certified to said Superior Court, to the intent that the appeal be dismissed. And it is considered and adjudged further, that the plaintiff and surety do pay the costs of the appeal in this Court incurred, to wit, the sum of Twelve 95/100 Dollars (\$12.95) and execution issue therefor.

413 Supreme Court of North Carolina, Spring Term, 1916.

No. 580.

CAROLINA-TENNESSEE POWER COMPANY

VS.

HIAWASSEE RIVER POWER COMPANY.

Cherokee County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Cherokee County:

Upon consideration whereof, this Court is of opinion that there is error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable P. D. Walker, Justice, be certified to the said Superior Court, to the intent that a new trial be awarded. And it is considered and adjudged further, that the plaintiff and surety do pay the costs of the appeal in this Court incurred, to wit, the sum of Seventy-two 05/100 Dollars (\$72.05), and execution issued therefor.

417 *Docket Entries, Spring Term, 1918.*

No. 585. (Defendant's Appeal) Docketed November 21, 1917; Argued December 12, 1917; Advisari. Opinion by Walker, J. filed May 28, 1918.

418 In the Superior Court of North Carolina, February Term, 1918.

No. 585.

CAROLINA-TENNESSEE POWER CO.

V.

HIAWASSEE RIVER POWER COMPANY.

Cherokee.

Civil action tried at March Term, 1917, of Cherokee Superior Court, before Judge W. J. Adams, and a jury. The case was before us at a former term and for any facts, not herein stated, reference may be had to the report of the case (171 N. C., 248).

The following summary of the facts so far as necessary to be stated at present, will show the contentions of the parties in a general way: This action was brought in the Superior Court of Cherokee County, by the plaintiff against the defendant, both of which are

North Carolina corporations, on the 21st day of August, 1914. Plaintiff alleged that it was a corporation organized under the laws of North Carolina, by virtue of a special act of the General Assembly, ratified 16th day of February, 1909 (Chapter 76, Private Laws of North Carolina, 1909), and further alleged that, by virtue of the rights conferred upon it by its charter, it had during the year 1909, and thereafter, but before the organization of the defendant company, surveyed, staked out, located and adopted by authoritative corporate action, locations and sites on the Hiawassee River in Cherokee County, N. C., for building and maintaining two hydro-electric plants for the generation of electricity to be sold for heat, light and power purposes; that it had acquired title to 50 per cent of the lands neces-

419 sary for its proposed developments, and had obtained contracts covering some lands for the same, and had begun condemnation proceedings for other lands; and that it had by deeds, contracts and under condemnation proceedings 75 per cent of the lands necessary for its proposed developments; that on the 21st day of June, 1911, it had duly filed in the office of the Clerk of the Superior Court for Cherokee County, maps and plans of its locations, as required by the terms of its charter; and that on or about July 13, 1914, the defendant corporation had been organized, and had purchased some lands lying above the proposed dams and hydro-electric developments of the plaintiff, which lands were necessary for the plaintiff's uses and purposes and were included in the maps and plans of said developments as filed in the office of the Clerk of the Superior Court for Cherokee County, and that the defendant was proceeding to acquire by deed, contract and condemnation, other lands and rights along and on Hiawassee River, which were necessary for the plaintiff's proposed developments, and that the defendant was in this way and manner interfering with and obstructing and preventing the plaintiff from carrying out its plans to make the developments contemplated by its charter, and by the surveys, maps, plans and proceedings used by it. The defendant filed an answer and an amended answer in the case denying the allegations of the complaint of the plaintiff, and pleading that if the plaintiff had ever acquired and adopted any locations on the Hiawassee River for its proposed developments, it had prior to the beginning of this action, abandoned the same; that the defendant had been organized as a corporation on the 13th day of July, 1914, and had immediately after the organization of the defendant corporation adopted by appropriate corporate action, certain locations for its dams and power houses on the Hiawassee River in Cherokee County, N. C., and that its right to any conflicting locations was superior to that of the plaintiff. Plaintiff replied to the defendant's amended answer and denied the allegations contained therein.

420 Upon the trial the following issues were submitted to the jury, who answered the same, as follows:

1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint, and as indicated

on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A? Answer: "Yes," by consent.

2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant company in July 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer: "Yes".

3. Did the plaintiff prior to the commencement of this action, on the 21st day of August, 1914, abandon its said locations and proposed plans as alleged in the answer? Answer: "No".

4. Did the plaintiff file the maps or plans of its said locations in the office of the Clerk of the Superior Court of Cherokee County, on or about June 21, 1911, as alleged in the complaint? Answer: "Yes".

5. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs and public works, which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint? Answer: "Yes". (By consent.)

6. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer: "Yes". (By consent.)

7. If so, did the defendant thereafter by authoritative corporate action adopt said locations, and if so, when? Answer: "No".

There was a judgment in favor of the plaintiff, and the defendant appealed.

421 Martin, Rollins & Wright, for Plaintiff.

J. N. Moody; Dillard & Hill; Felix Alley; Zebulon Weaver; and McDaniel & Black, for Defendant.

WALKER, J., after stating the case:

The plaintiff says that, upon a fair analysis and consideration of the verdict, there is little, if anything, left, after the decision in the former appeal, for the defendant's present contentions to rest upon, and for these reasons, as stated in its brief:

First, it was found in the first issue by consent, that plaintiff's locations for its dams, reservoir and public works had been surveyed in the year 1909, as alleged in the complaint, and the plaintiff had alleged in its complaint that in the year 1909, that officers, engineers and representatives of the plaintiff had entered upon, explored and surveyed the lands bordering on the Hiawassee River for the location of said works. So the finding of the first issue, by consent, established the fact that the plaintiff had had the proper survey made.

Second, the jury found, based on abundance of testimony as we insist, that the plaintiff has, as set out in the second issue, prior to the organization of the defendant company, adopted said locations by authoritative corporate action.

Third, that the plaintiff did not abandon said locations, as alleged in the answer.

Fourth, that plaintiff had filed maps or plats of its locations in the

office of the clerk of the Superior Court of Cherokee County, June 21, 1911.

Fifth, that on the 17th day of August, 1914, plaintiff had, by a formal resolution, adopted said locations for its dams, reservoirs and public works. This issue was found by consent of the defendant, and was clearly proven by the minutes of the corporation introduced, dated 17th day of August, 1914.

Sixth, the jury found, by consent, that the locations claimed by the defendant had been surveyed and staked out on the Hiawassee River, and

Seventh, that the defendant had not adopted such locations."

Plaintiff then insists that the defendant would not be entitled to a new trial in any event, because of any error which arose either on the first, second, third, or fourth issues, unless there was also reversible error arising on the seventh issue. And further, defendant would not be entitled to a new trial for reversible error arising on the seventh issue, unless there was reversible error arising either on the second, third or fourth issue, as well. In other words, the defendant agrees that the plaintiff had adopted locations on August 17, 1914, now unless there was error on the seventh issue concerning the defendant's adoption of said locations prior thereto, then the verdict in favor of the plaintiff on the fifth issue establishing the plaintiff's location, entitles the plaintiff to judgment, and, as before stated, reversible error if it existed on the seventh issue would not entitle the defendant to a new trial, unless there was also reversible error, either on the second, or third or fourth issues, and of course, then only on the issue concerning which reversible error was found.

These are substantially the plaintiff's contentions upon the verdict, and they would seem to be a fair and reasonable construction of the same, when we understand and consider the questions at issue.

When the case was here at a former term, we remanded it, so that the jury might find more definitely certain facts regarding the time when the plaintiff "surveyed, staked out, and adopted the locations of the sites of its dam, reservoirs and public works on the Hiawassee River," and also pass upon certain findings stated by the presiding Judge as supplementary to the verdict of the jury, and especially to have it found under an issue submitted for the purpose, whether plaintiff's map was duly filed in the office of the Clerk of the Superior Court, and, if it was, at what time. The jury have found all the essential facts in favor of the plaintiff, this being the second verdict.

It has been found that the map of plaintiff's locations was filed in the office of the Clerk of the Superior Court, June 21, 1911, as alleged in the Complaint, and there was evidence, as we think, to support this finding. It has been held that "a paper writing is deemed to be filed within the meaning of the law when it is delivered for that purpose to the proper officer and received by him, and it is not necessary to the filing of a paper that it shall be endorsed as having been so filed. The file mark of the officer is evidence of filing, but is not the essential element of the act," unless the statute

makes it so. 34 Cyc., 587, sec. A. 1; Eureka Stone Co. v. Knight, 82 Ark., 164; Darnell v. Flynn, 69 W. Va., 146; People v. Fisch, 164 Mich., 680; Edward v. Grand, 121 Cal., 254; 256; Tregambo v. Comanche Mill, etc., 57 Cal., 501, 506; Hull v. Louth, 109 Ind., 315; State v. Foulkes, 94 Ind., 493; Masterson v. South. R. R. Co., 82 N. E., 1032. Additional cases in other jurisdictions where this question has arisen, will be found in Words and Phrases (2d Series) page 531, and especially at p. 533, and the point is decided the same way, in principle, by this court in Glanton v. Jacobs, 117 N. C., 428, 429; Smith v. Lumber Co., 144 N. C., 47, 49. As far as the actual location is concerned, we have already held, when this case was here before, that the prior right belonged to that company

which first defined and marked its route and adopted the same
424 for its permanent course or location, by proper and authoritative corporate action. Fayetteville Street R. Co., v. Railway Company 142 N. C., 423; Chesapeake, etc., Railway Co., v. Deep Water R. Co., 57 W. Va., 641; In re Milwaukee Light, Heat and Traction Co., 112 N. C., p. 663; Cumberland R. Co. v. Pine Mountain R. Co., 96 S. W., 199; Rochester etc. Co. v. N. Y., etc. R. Co., 116 N. Y., 128; Elliott on Railroads, sec. 927; San Francisco W. Co. v. Alameda Water Co., 36 Calif., 639; L. M. Water Co. v. Cowles, 31 Calif., 215. The two California cases refer to the efforts of rival companies to acquire water rights on the same stream, and in the last one of them it is said: "Respondent therein having, prior to the institution of appellant's proceedings to condemn, secured essential property rights in the premises ther-by sought to be condemned by successful negotiations and the construction of works necessary to the appropriation of the waters to accomplish all the business of its corporation, we can discover no just grounds for subordinating its rights thus acquired to the subsequent effort of appellant to acquire the same property for similar purposes by compulsory process of acquisition." In Sioux City etc., Ry. Co. v. Chicago M. & St. P. Ry. Co., 27 Fed., 770, the Court said: "It is certainly equitable that a company which in good faith surveys and locates a line of railway, and pays the expense thereof, should have a prior claim for the right of way for at least a reasonable length of time * * * The right to the use of the right of way is a public not a private right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner cannot, by conveying the right of way to A., thereby prevent the State from granting the right to B., and subject to the right of compensation to the owner, the State has the control over the right of way, and
425 thereto shall vest, and also what shall constitute an abandonment of such right." And in Railroad Co. v. Railroad Co., 96 S. W. Rep., 199, it was said by the Court: "When a company has actually located its right of way, and is in good faith following up its location by buying the land or instituting proceedings to condemn it with reasonable diligence, another company cannot go to a point on

the route which is neither the beginning nor the ending of its proposed line and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus. The railroad company is authorized to take land under eminent domain, and when it has in good faith entered for this purpose, located its right of way and is proceeding to perfect its right, the law prefers him who thus first enters in good faith, and it can not be permitted that another company with notice of his rights shall make another survey right behind him and destroy his priority which he has thus gained. While it is true that on some days the Pine Mountain Company's were ahead of the Cumberland company's engineers, they got thus ahead by beginning in the middle of the line and then running a race with the other people. The statute does not contemplate this. It contemplates a location in good faith and in the usual course of business. Under the circumstances we conclude that the Cumberland company has the better right. The motion to discharge the injunction granted to it is overruled. The motion to discharge the injunction granted in favor of the Pine Mountain Railroad Company is sustained, and that injunction is dissolved." Discussing the same question in the case of *In re Milwaukee L. H. & T. Co.*, 112 N. W. Rep., p. 663, the Court said: "In such case the prize would go to the company which first secured a completed location. So it appears that prior to January 16, 1906, the respondent company had made or adopted a fully completed survey over the disputed lands, and determined in good faith to build its railroad thereon, had secured all the necessary franchises and crossing privileges from towns and villages, and had obtained option contracts on all but a very small fraction of said lands, and intended in good faith to utilize such options and take deeds of the lands at an early date. These are very decisive acts, and unless it be necessary that it should have actually secured deeds or binding contracts to purchase the lands, these acts must be held to constitute a completed location, so far at least as to give precedence in a contest with a rival company seeking to obtain the same lands. Certainly it was not necessary that it should have paid for the lands or secured deeds. As to all the world except the owner, the appropriation of land for railroad purposes may be complete without either of these steps and the only question then is whether it was necessary that it should have bound itself by contract to purchase the lands. We think not. The essential requirement is, not that there should be a completed purchase, but that there should be decisive corporate action taken in good faith locating the route and committing the corporation to that route, though not necessarily irrevocably. The securing of option contracts over practically the whole line surveyed, with the bona fide intention of utilizing them and completing the purchases and building the line, must be held to be such a decisive act, and we therefore hold that the petition for condemnation was properly denied." *Rochester etc. Co. v. N. Y. etc. R. Co.*, 110 N. Y., 128. See also *Chesapeake etc. R. Co. v. Deep Water R. Co.*, 57 W. Va., 6411, and note to *Fayetteville St. Ry. Co. v. Railway Co.*, 9 Anno. Cases, p. 689. The plaintiff, therefore, has acquired the prior right.

The defendant has assailed the charter of the plaintiff, as being unconstitutional and invalid. We decided before that the charter was a valid exercise of the legislative power and especially held that the fact of allowing the plaintiff to engage in private enterprise and

427 to exercise the power of eminent domain did not invalidate it, as it could purchase property, as it had done, for its private purposes, and condemn it when necessary for its public or quasi public purposes, citing 15 Cyc., 579; *Land Co., v. Traction Co.*, 162 N. C., 314, and other cases. Besides, the plaintiff has not as yet attempted to condemn any property, and it is premature to raise a question which certainly is not presented now, and may never be. If, hereafter plaintiff attempts to invade any of the property rights of the defendant, the latter will have ample time and opportunity to defend them in the proper forum. We considered, and decided, in the former appeal other objections to plaintiff's charter, and to its right to proceed in acquiring riparian and other property rights on the river by the means and measures set forth in the case. As far as appears, the defendant does not seem to have any right which is likely to be invaded, as the jury, by the seventh issue, have found that there was no adoption of the locations claimed by it, but we need not dwell on this matter any further, as we are of the opinion that, upon the verdict, the plaintiff is entitled to judgment regardless of this matter, as it is shown thereby that plaintiff has acquired a prior and superior right, especially by that part of it contained in the first, second, third, fourth and fifth issues, and those issues were answered by the jury upon sufficient evidence to support the findings.

The objection to the plaintiff's charter, that the 30 days' notice required by Const. Art. 2, sec. 12, had not been given, is untenable, as we have often held, that the validity of a statute cannot be attacked in this collateral way. The same kind of objection was made in *Broadnax v. Groom*, 64 N. C., 244, and Chief Justice Pearson said in regard to it, at p. 247: "We do not think it necessary to enter into the question; whether this is a public Local act, or a mere private act, in regard to which thirty days' notice of the application must be given; for taking it to be a mere private act, we are of opinion,

428 that the ratification certified by the Lieutenant Governor and the Speaker of the House of Representatives, makes it a 'matter of record,' which cannot be impeached before the courts in a collateral way. Lord Coke says, 'a record until reversed importeth verity.'" See also *Gatlin v. Tarboro*, 78 N. C., 119; *Wilson v. Markley*, 133 N. C., 616.

The position that the legislature cannot grant the power of eminent domain to one public service corporation, unless it is granted to all such corporations, or in one or more counties unless granted in all, would greatly curtail the industrial growth and progress of the State, if it is a correct one. For example, certain localities may be selected, as in this case, because of the facilities afforded of conducting enterprises calculated to promote the public welfare, where the facilities and advantages necessary for the purpose exist. It could hardly be contended, with any hope of success, that, in such a case, the legislature is without the power to grant the right of condemning property

locally in order that a company may avail itself of those facilities which may exist in certain parts of the State and not in other sections. Such a right has been conferred in many instances, especially in the case of railroad companies and other like corporations, which serve the public. It is not forbidden to be done by our Constitution, Art. 1, sec. 7, (Bill of Rights) which declares, that "no men or set of men are entitled to exclusive, or separate emoluments, or privileges, from the community but in consideration of public services," because in this case the power to condemn is based upon the obligation to render that kind of service. The Chief Justice said in the Case of *In re Spease Perry*, 138 N. C., 219, "that public ferries are not monopolies, but franchises granted in consideration of public services (*Smith v. Harkins*, 38 N. C., 619), and that there is a correlative duty devolved upon the grantees, as common carriers, to serve the public, and under public regulations of their charges and
429 duties, and has been uniformly held from the earliest times and in all jurisdictions." The distinction between this case and *Bridge Co. v. Commissioners*, 81 N. C. 491, is stated by the Chief Justice. Electric light and power companies are public service corporations, and their rates, or charges to the public, may be regulated as in the case of other public corporations. It was said in *Griffin v. Water Company*, 122 N. C., at p. 207: "The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is 'affected with a public use.' In *Munn v. Illinois*, 94 U. S. 113, which was a case in regard to regulating the charges of grain elevators, it was held that, in England from time immemorial and in this country from its colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers and many other matter- of like nature, and, where the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such case and must to the extent of that interest submit to be controlled by the public. Probably the most familiar instances with us are the public mills whose tolls are fixed by statute, and railroad, telegraph and telephone companies, for the regulation of whose conduct and charges there is a State Commission, established by law. There have been reiterated decisions in the United States Supreme Court and in the several States affirming the doctrine laid down in *Munn v. Illinois*, supra, and as to every class of interest affected with a public use, among others, water companies," citing *Spring Valley v. Schottler*, 110 N. C. 347. "It is very generally held that a telephone company, acting under a quasi-public franchise, is properly classified among the public-service corporations, and as such is subject to public regulation and reasonable
430 control. *Telephone Co. v. Telephone Co.*, 159 N. C., 9.

The duties and obligations assumed by the plaintiff, in its charter, are, therefore, of such a nature that it may properly be characterized as a public service corporation, rendering services to the community in like manner as in the cases above cited. It is declared to be a public service corporation in Public Laws of 1913,

Ch. 133. So that being a corporation which serves the public, it comes within the proviso, or exception of Article 1, sec. 7 of our constitution.

In *Mugler v. Kansas*, 123 U. S. 623, the Court said, in regard to the extent and operation of the fourteenth amendment upon local laws: "But this Court has declared, upon full consideration in *Barbier v. Connelly*, 113 U. S. 27, that the Fourteenth Amendment has no such effect. After observing among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoliation of life and liberty, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity,' which was quoted with approval by this Court in *State v. Moore*, 104 N. C. at p. 721, 722. And Judge Cooley said in his work on *Const. Limitations* (7 Ed.) at p. 555: "The authority which legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens, or on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the State, may require or make acceptable different police regulations from those demanded in another, or call for different taxation, and a different application of the public moneys. The legislature may there-

fore prescribe or authorize different laws of police, allow the
431 right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of local or special operation is not supposed to render them obnoxious in principle." And in the same work, at p. 544, Note 2, it is said: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act," citing *State v. County Commissioners of Baltimore*, 29 Md., 516; *Pollock v. McClurken*, 42 Ill., 370; *Haskel v. Burlington*, 30 Iowa, 232; *Unity v. Burrage*, 103 U. S., 447. This doctrine was approved by this court in *State v. Moore*, supra. The power to restrict legislation affecting public interests to certain localities was discussed and asserted in *State v. Barrett*, 138 N. C. 630, the Court remarking that it had been so long, and in so many instances, recognized that it was not deemed necessary to re-examine the grounds upon which it rests. In our case there is nobody competent to raise the question as the jury have found, that defendant has no vested interest to be impaired, not having adopted any plan of improvement, and no condemnation of property heving been at-

tempted by the plaintiff, and no one in the excepted territory being a party to the suit. There is therefore no wrong done to the defendant, and no violation of its constitutional rights. The legislation is neither partial nor *disemmentary*.

We do not see how the determination of this case can be affected by the argument in regard to riparian rights. If the plaintiff does not acquire by purchase the necessary land and water rights or easements, it will have to condemn them and pay a just compensation for the same. It cannot interfere with the lawful rights of another, either above or below the place on the stream, where it has obtained priority of location, unless it has acquired by purchase or condemnation, or in some other legal way, the right to do so. It
432 may be, that, hereafter the extent of plaintiff's rights in the waters of the stream may arise in some way, but it is not presented at present. The plaintiff would, of course, have no power of eminent domain merely because it may be a riparian proprietor, as that power can be acquired only by legislative grant, it being a sovereign power. It is not an incident of private ownership. *Lloyd v. Venable*, 168 N. C., 530; 1 Cyc., 567; *Lewis on Em. Domain*, sec. 240; *Commissioners v. Bonner*, 153 N. C., 66.

On the question of abandonment, we think that the learned judge presented the law to the jury in a very full, clear and ample manner, and in strict accordance with the law upon that subject, as we understand it to be. *Falls v. Carpenter*, 21, N. C., 237; *Faw v. Whittington*, 72 N. C., 321; *Banks v. Banks*, 77 N. C., 186; *Miller v. Pierce*, 104 N. C., 391; *Railroad v. McGuire*, 171 N. C., 277; 1 Cyc., 3; *Aiken v. Insurance Co.*, 173 N. C., 400; *Public Utilities Co. v. Bessemer City*, 173 N. C. 482. He did say that mere non user, or lapse of time, or delay in prosecuting the enterprise, or the existence of a period of time during which no work was done, would not, under the circumstances, be sufficient of itself to constitute abandonment, but he as clearly stated to the jury, if not expressly, then by the plainest implication, so that they could not have misunderstood him, that it was evidence of abandonment. If the defendant considered the charge in respect to this matter not as full as it ought to have been, it should have asked for it to be made more definite. *McKinnon v. Morrison*, 104 N. C., 354; *Simmons v. Davenport*, 140 N. C., 407; *State v. Yellowday*, 152 N. C., 793; *Orvis v. Holt*, 173 N. C., 231. The charge not only stated the law in a general way, but explained it in much detail, and in all its bearings, and with strict regard to the evidence, which, it was claimed by defendant, tended to prove an abandonment by the plaintiff. It is said in *Elliott on Railroads*, sec. 931: "No general rule of law applicable to all cases can be laid down as to what constitutes abandonment of the whole or a part of its right of way by a railroad company, but the question whether abandonment exists in a given case must be determined by the particular circumstance of that case," citing numerous cases in the notes. See also

433 *Tenn. & Coosa R. Co. v. Taylor*, 57 Am. & Eng. R. Cases, 1 Am. & Eng. Enc. of Law, 296, p. 1; *Pittsburg Vt. C. R. Co. v. Pittsburg, S. L. R. Co.*, 28 Atl. Rep., 155. We have assumed so far,

and for the purpose of argument, that the defendant can set up the defence of abandonment, and that this right does not belong solely to the State. Having proceeded upon that assumption, it will not be necessary to consider whether it is a correct one. The question is discussed, however, in *Pittsburg V. & C. R. Co. v. Pittsburg S. L. R. Co.*, supra, and *West. Penn. R. Company's Appeal*, 104 Pa. St. 399. The Court instructed the jury as to the effect of Laws of 1913, Ch. 133, which fixes the time within which a water power company, already incorporated, shall begin active work at two years after the passage of the Act, and requires a diligent prosecution of the same, and provides further that if it is not so begun, the Corporation Commission may recommend to the Attorney General that suit be brought for the State through him, to declare a forfeiture of its charter. The Court properly told the jury that the failure to comply with this law is something of which the State alone can take advantage, and it so expressly provided in the act.

There are several questions of evidence, but it will not be necessary to consider them in detail. The deeds offered in evidence by the defendant were executed after this suit was commenced. We do not see the relevancy of them to this controversy, in the light of the issues. Ordinarily, unless properly introduced by supplemental answer or other pleading, or by plea puis darrein continuance, defendant cannot avail himself of matters strictly of defense which have arisen since the action was commenced, or in an action involving the title to property, rely upon a title strictly of a defensive character, which has been acquired since the commencement of the action, or matter which goes only to the further maintenance of the action. 31 Cyc., 684, 493 and 497. He will not generally be allowed to bolster up his case by such new matter as is here offered,

on account of its dangerous tendency. There are cases where things happening post litem may be brought before the Court, but this is not one of them. It was said in *Hollingsworth v. Flint*, 101 U. S., 591, 596: "The plaintiff could not avail himself in this action of a title acquired, or which did not subsist in him until after he commenced the suit. The title at the beginning of the action was the question to be tried." And in *Stein v. Bowman*, 13 Peters, at p. 220: "The declarations offered as evidence were made subsequent to the commencement of this controversy, and in fact after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter, after the controversy has commenced. This would enable the party by ingenious contrivances, to manufacture evidence to sustain his cause." The action should be tried as of the time when it was commenced, though there are a few exceptions to this rule, which are not applicable here.

The other objections to evidence are of no substantial importance, as we discover nothing that shows any clear intention, on the part of the plaintiff to abandon its location or any right it acquired by what it had already done in the furtherance of the project, nor anything to show that it was not acting in good faith with the intention of continuing in the prosecution of the work. Besides, the

defendant had seriously questioned the plaintiff's motives, and it was competent to rebut the accusation by evidence tending to show its falsity.

The defendant has assigned error in the charge of the Court, but we have carefully examined the same and it appears therefrom that the Court has committed no such errors as alleged, but has given fair and correct instructions throughout, and the jury seem to have decided and answered the several issues submitted to them in accordance with the clear weight of the testimony. The refusal of a non suit was also proper, whether or not the plaintiff should have an injunction, as it is entitled to the other relief prayed for.

Defendant contends that an injunction cannot issue against it to stop interference with plaintiff's right as determined by the jury, upon the ground that there has not been, and will not probably be, any such interference as will entitle the plaintiff to such equitable relief, and also that plaintiff will have an adequate remedy at law. It is a mistake to suppose that plaintiff's only right in this case is that of a riparian owner acquired by purchase, as it has other rights conferred by its charter, apart from its ownership of the banks of the stream or any part thereof. But defendant relies upon a case recently decided by the Supreme Court of the United States in *Sears v. City of Akron*, 38 Supreme Court Reporter (April 1, 1918), p. 245. An examination of that case will show that it has no application here. The Court did not decide in that case that an injunction would not lie generally to protect such rights as the plaintiff in this case possesses, but the restraining process was denied there for special reasons, among them the following: That plaintiff's charter, under the reserved power of the State as contained in the Ohio Constitution, was subject to amendment, and that the special act of the Legislature of Ohio, by which the City of Akron was authorized to divert and use the Tuscarawas and Little Cuyahoga Rivers and tributaries thereto, for the purposes of a water supply, must be regarded as an amendment of plaintiff's charter to that extent, where there had been nothing done, but the mere incorporation of the Cuyahoga Company and no land had been acquired by it, except a very small quantity, and there was no actual or probable interference with plaintiff's right in taking water from the stream for the use of the city. It is apparent from the statement of the facts in that case and the general trend of the opinion by Justice Brandies, that the Court was largely influenced, in its refusal of equitable relief by injunction, by the fact that, as said by the Court, "the property alleged to be now owned by the plaintiff was not acquired by it until after the City's development had been practically completed." The City therefore, for the present at least, had acquired the preferential right to the appropriation of the rivers for its public supply of water by prior user, and this right was recognized as superior to that claimed by the plaintiff, and for the further reason that the plaintiff could not be harmed, so far as appeared at the time of the trial, by the City's taking water from the river for its uses. The Court said: "It follows from what has been

said above, that at least until something more had occurred than incorporation, the city was free, as against the Cuyahoga Company, to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken. *Adirondack Railway v. New York State*, 176 U. S. 335, 20 Sup. Ct., 460, 44 L. Ed. 492; and the Act of 1911, and the ordinance (under which the city justified) were both passed before the company had acquired any property." It will be observed that the Court did not decide as to the "preferential right" of the plaintiff under facts and circumstances such as exist in this case, while this Court has held, as shown by the cases above cited, that such a right exists in favor of this plaintiff, upon the facts which were undisputed. The case of *Sears v. City of Akron*, originated in a Federal Court, but the question involved is not one of federal law, and even if there

437 were any conflict between that case and what we decide (and there is none) we would be governed by our own view of the law, as applicable to the special facts of this case. It may be further said, that our case differs from *Sears v. City of Akron* in the fact that the defendant's contemplated acts will be most harmful to the plaintiff, and will seriously impair its rights and utterly destroy them, if defendant's proposed plan of development is fully carried out. Besides we have a statute in this State which permits the plaintiff to establish its rights, and remove any cloud from them by suit against a party claiming adversely thereto, and an injunction, under our law, is a remedy which can be resorted to for the purpose of protecting the same against threatened invasion by the defendant, or to prevent it from setting up any further and false claim to the rights and property in controversy, and thereby clouding the plaintiff's title, and impairing the value of its property rights. Revisal of 1903, section 1589. The amended statute and annotations will be found in Pell's Revisal of 1908, at p. 1588, sec. 1589. This statute being of a remedial and beneficial nature should be liberally construed, and should be held to embrace all cases coming fairly and equitably within its scope. We said of this statute in *Chrisman v. Hilliard*, 167 N. C., 4, at p. 8: "The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should, therefore, be construed liberally. It is also a statute of repose, and also

for that reason, is entitled to favorable consideration. *Adler v. Sullivan*, 115 Ala., 582; *Walton v. Perkins*, 33 Minn. 357; *Holmes v. Chester*, 26 N. J. Eq., 81. It deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put it to the test of early judicial investigation, and does not compel plaintiff to wait on his pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. *Jersey City v. Lembeck*, 31 N. J. Eq., 255. The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. *Daniels v. Fowler*, 120 N. C., 14; *Rumbo v. Mfg. Co.*, 129 N. C., 9; *Beck v. Meroney*, 135 N. C., 532; *Campbell v. Cronly*, supra. The beneficial purpose of the statute is to free the land of the cloud resting upon it, and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. This case is within its letter and spirit, and plaintiff has a right to the relief he seeks, if he can make good his allegations, "citing *Campbell v. Cronly*, 150 N. C., 457. And in a more recent case, this Court gave it a broad interpretation in order to carry out the evident purpose of its enactment, and said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as its terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs." *Satterwhite v. Gallegher*, 173 N. C. 525, at p. 528, citing *Rumbo v. Manufacturing Co.*, 129 N. C., 9. Referring to a similar statute of Nebraska, Justice Field said, in *Holland v. Chellen*, 110 U. S., 15; (Cited in *Chrisman v. Hilliard*, supra): "Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate in it for the purpose of determining such estate and quieting his title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed; for so long as they

remain they will prevent improvement and consequent benefit to the public. It is a matter of every day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several states, and they accomplish a most useful purpose." Referring to the remedy of injunction as auxiliary to the principal relief of removing a cloud or preventing one from being thrown on the title the general rule is thus stated in *High on Injunctions* (4 Ed.) Vol. 1, p. 349, sec. 372: "The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity, recognized by all the authorities, and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon

440 title is closely analogous to the well settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal if not greater force in the former. It seems, therefore, to follow, as a necessary consequence, that if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title." As to the jurisdiction of equity to grant a perpetual injunction for the purpose of quieting a title, or right, in property, which has been fully established, when necessary to fully protect the complainant or make his remedy effectual, see *Wickliffe v. Owings*, 17 How., 47. And with respect to the remedy, which is given by statute in several of the States, including this one, it was said by the Court in *Spencer v. Merwin*, 80 Conn. 330, at p. 334: "General Statutes, section 4053, authorizes this special statutory remedy when legal injury results to the owner in possession of land from unlawful claim of an adverse estate or interest in that land; the statutory relief authorized is equitable, and consists in a judgment quieting and settling the title to the land in dispute, and necessarily includes such incidental relief as may be proper to make the main equitable relief granted full and complete." It was held in *Oakley v. Trustees of Williamsburg*, 6 Paige 2621, and virtually also in *Petit v. Shepherd*, 5 Paige, 493, that a Court of Equity has jurisdiction to enjoin a defendant from proceeding in an illegal act which will operate so as to cast a cloud on the plaintiff's interest or right in real estate, and thereby diminish its value. And in *Meyer v. Phillips*, 97 N. Y., 485, it was decided that one through whose lands various persons are threatening to float a large number of logs, using a stream thereon for the purpose, and claiming a

441 right in the public to so use the stream, may maintain an equitable action to quiet his title and settle his rights, and prevent the threatened cloud." Of course the danger to plaintiff must not be merely speculative or imaginary, for an equitable action will not lie to remove a cloud on title or to prevent one, unless it is made to appear that there is substantial ground of apprehension that defendant will so act as to cloud the same, and that there is a dete

mination or purpose to do so, and it was so held in *Sanders v. Davenport*, 95 N. Y., 477, affirming same case reported in 30 Hun. 161. An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created, *Thomas v. Simmons*, 103 Ind., 538, and where the object is merely preventive, an injunction is the proper remedy to restrain the doing of the wrongful act. In our case the title of plaintiff, whether it is considered as growing out of the ownership of land, or water rights, or an easement or incorporeal hereditament therein, has been established by a verdict and a judgment upon it, and, therefore, the right is clear, and the injunction extends so far only as to prevent the defendant from doing the threatened acts, which if done will certainly interfere with and obstruct plaintiff in prosecuting its plan of development, to which it has established, under our law, a preferential right. If not restrained by the injunctive process of the Court, defendant may very seriously harass and hamper the plaintiff, who is now engaged in a work of improvement which will be of great value and usefulness to the community where it is situated.

The recent amendments of our constitution have nothing to do with this case, for as to it they operate and take effect prospectively.

We have carefully examined the case, as it appears in the record, and have been unable to find any error in the proceedings or judgment.

No error.

442 Supreme Court of North Carolina, Spring Term, 1918, Cherokee County.

CAROLINA TENNESSEE POWER COMPANY

No. 585.

VS.

HIAWASSEE RIVER POWER COMPANY.

This cause came on to be argued upon the transcript of the record from the Superior Court, Cherokee County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable P. D. Walker, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed. And it is considered and adjudged further, that the defendant and W. Christopher, surety, do pay the costs of the appeal in this Court incurred, to-wit, the sum of Thirty-six 55/100 Dollars (\$36.55), and execution issue therefor.

443 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and correct tran-

script of appeal to the Supreme Court of North Carolina at Spring Term 1918 in the cause entitled Carolina Tennessee Power Company v. Hiawassee River Power Company and also copies of the decision and judgment of said Supreme Court of North Carolina in the two appeals by the plaintiff and the defendant in the said cause at Spring Term 1916, as appears from originals of said documents on file in my office.

Witness my hand and seal of said Court at office in Raleigh this September 14, 1918.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,

Clerk of the Supreme Court of North Carolina.

Endorsed on cover: File No. 26755. North Carolina Supreme Court. Term No. 669. Hiawassee River Power Company, Plaintiff in Error, vs. Carolina-Tennessee Power Company. Filed September 20th, 1918. File No. 26755.

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(N. C. Statutory Law cited is attached as appendix
to brief.)

IN THE
Supreme Court of the United States

October Term, 1919

No. 208

HIAWASSEE RIVER POWER COMPANY,
Plaintiff in Error,

vs.

CAROLINA-TENNESSEE POWER COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This was a civil action filed in the Superior Court of Cherokee County, North Carolina, by the plaintiff on August 21st, 1914, for the purpose of securing a perpetual injunction against the defendant to prevent the defendant from constructing and operating certain power plants contemplated by it at points on the Hiawassee River in Cherokee County, North Carolina, the land necessary for this purpose having been acquired by it, and to further restrain the defendant from purchasing other lands along said river to be used in connection with its water power developments.

The complaint alleged that the plaintiff Company was incorporated in the year 1909 and that during said year it entered upon and surveyed the land bordering on the Hiawassee River from a point at or near the line between the States of North Carolina and Tennessee and running

up the river to a point near the town of Murphy, and that during said year 1909 the plaintiff determined upon and adopted by its Board of Directors the location of its works for the development of water power, and that said works contemplated the use of the Hiawassee River from the said State line to a point near the town of Murphy, and that since its incorporation it has been and still was actively engaged in carrying out its plans for the development of the water power on the Hiawassee River.

The complaint further alleged that the defendant, the Hiawassee River Power Company, was incorporated on July 13th, 1914, for the purpose of supplying the public with electric current for light and power and for developing the water power upon the Hiawassee River, and that it had acquired from one Hugh F. Van Deventer certain lands and contracts for the purchase of lands upon and along the banks of said river between the Tennessee State line and the junction of Notla River and the Hiawassee River, and that such use of said lands was inconsistent with the use thereof by the plaintiff—that is, that the land sought to be used by the defendant for the purpose of constructing its dams and works was the same sought to be used by the plaintiff, and because of such survey and adoption of its said locations in 1909 the defendant should be restrained from erecting and maintaining power plants upon its lands and from acquiring or condemning land along said river, and from doing any and all acts which interfered with the plaintiff's plans, and that to prevent the defendant Company from so acquiring lands or so developing its plans of development, it should be perpetually enjoined.

See Complaint, page 16 of record.

The defendant Company filed its answer, in which it admitted that the plaintiff Company was chartered by an Act of the General Assembly of North Carolina on the

16th day of February, 1909, and in which it set forth that it had no knowledge or information upon which could be based a belief as to the survey claimed to have been made by plaintiff in 1909, and in which it denied that plaintiff had acquired any large portion of land along the Hiawassee River and denied that a survey of the works of plaintiff Company, showing the location thereof and the lands necessary therefor, had been filed with the Clerk of the Superior Court of Cherokee County, as required by the charter of the plaintiff Company; and in which answer it admitted that the plaintiff Company had started certain condemnation proceedings some years prior to the filing of the petition, but had never prosecuted them or acquired any lands by reason of them; and in which it admitted that several years prior to the filing of the petition plaintiff did take a number of options to purchase lands abutting on the river, but had allowed most of these options to lapse and had lost all rights under said options; and in said answer it alleged that the plaintiff had done nothing since its incorporation looking to the carrying out of the purposes of its creation and was inactive except at such times as it made efforts to prevent other people from developing the power in the Hiawassee River; and denied that the plaintiff had been engaged in carrying out its plans, or had purchased the lands necessary for its plans, or had ever constructed any works for the generation of electric current, and asserted that it had done absolutely nothing in the way of construction from the date of its organization to the date of the filing of its complaint. In its answer the defendant admitted that it was a corporation organized under the laws of the State of North Carolina on July 13, 1914 for the purpose of supplying to the public electric current and for this purpose developing the water power of the Hiawassee River in the County of Cherokee near the town of Murphy, and that immediately after its incorporation one Hugh F. Van Deventer, who had been purchasing lands along the river for the purposes of the corporation and taking con-

tracts for the purchase of other necessary lands, turned all of said lands and contracts over to defendant, and that immediately after its organization defendant started certain necessary condemnation actions for other lands. Defendant admitted that it intended to acquire all the lands along the river necessary to erect such dams, reservoirs and power houses as might be necessary for its development purposes, and asserted that it had two dam sites on the river where it owned the lands on both sides and that the Carolina-Tennessee Power Company did not own land on both sides of the river at any point where it claimed to intend to erect a dam. The answer denied the knowledge of Van Deventer or of the defendant company of the plans and purposes of the plaintiff, as claimed in its suit, relative to the development of the river, and denied that there were any marks on the ground or any developments which showed any such purposes, and denied that there was any map filed with the Clerk of the Superior Court showing the location of its works, and denied that plaintiff intended to make any development upon the Hiawassee River, or that it had any right superior to the rights of defendant, and averred that at the time Van Deventer started to acquire lands along the river the plaintiff Company was in the hands of a receiver and had long since abandoned any development which it had ever contemplated along this river. The answer averred that the defendant was honestly incorporated, with the honest purpose of carrying out its development upon the river, and that it had already started work upon one of its dam sites, to wit: the one near the mouth of Shoal Creek upon this river, and in its original answer defendant asked that the plaintiff be restrained and enjoined from interfering with defendant in carrying out its purposes and its plans.

See Answer, page 21 of record.

The plaintiff filed its reply to the answer and afterwards filed its amended complaint. In its amended complaint it

set up the charter granted it by the General Assembly of North Carolina on February 16th, 1909, and the provisions of said charter pertinent to the issues in this case, and in its amended complaint it repeated its allegations that the defendant was acquiring and attempting to acquire lands which would be inconsistent with the purposes of the plaintiff, and that Van Deventer for more than two years, and the defendant at all times, has had knowledge of the plans and purposes of the plaintiff, and that the plaintiff intends to appropriate the waters of the Hiawassee River and that if defendant is permitted to acquire or use lands it would interfere with the work of plaintiff.

See Amended Complaint, page 34 of record.

The defendant filed its amended answer in which it set forth the fact that it was incorporated on July 13th, 1914, and the portions of its charter pertinent to this suit, and that prior to its incorporation Hugh F. Van Deventer, the developer of the corporation, had had the water powers of the river thoroughly investigated, had had the lands adjacent thereto surveyed, such surveys showing the location of the proposed dams upon the river and the lands flooded thereby, and had had the properties abutting upon the river which were to be flooded surveyed so as to show the property lines of the respective owners of the property upon both sides of the river, and had had an investigation and report made upon the water power of the Hiawassee River at Shoal Creek and Coleman dam sites, the two sites proposed to be developed by defendant, and that large tracts of land necessary for the purpose of defendant Company had been acquired, and that all of these surveys and lands and reports had been transferred to the defendant Company upon its organization, all of which were accepted and adopted by the defendant Company, and its two dam sites known as Shoal Creek dam site and Coleman dam site were properly adopted by the defendant Company; that it had

brought necessary condemnation suits for other lands; that it had authorized the making of the contract for the erection of the Shoal Creek dam; that it had actually started to drill the foundations for the dam site; that on the other hand, the plaintiff Company, though it had been in existence since 1909, had never taken any step in its proposed development; that defendant brought a condemnation suit against Alvin Fowler, and subsequent to the bringing of such condemnation suit plaintiff bought this land sought to be condemned, and that the same situation arose as to the land of John Greene, and that defendant brought a condemnation suit against the land of Martin and subsequent thereto plaintiff brought a condemnation suit for the same land; that all these acts showed the bad faith of plaintiff Company and showed that it was simply attempting to hinder and delay defendant; that plaintiff has started condemnation suits against defendant for this land, not for the purpose of acquiring land, but for the purpose of hindering and delaying defendant in its proposed development; that plaintiff had long since abandoned any plans or any locations for dam sites upon which it might ever have proposed to erect dams; that defendant has the sole right to the development of the Hiawassee River; and for all these reasons in its amended answer defendant prayed for a perpetual injunction against the plaintiff.

See Amended Answer, page 39 of record.

To this amended answer plaintiff filed its answer, which in effect denied the material allegations of the defendant's amended answer.

See Plaintiff's Answer, page 45 of record.

This was the case as shown by the pleadings of the parties and upon these pleadings the issues were submitted to the jury. The pleadings are shown in the record from

page 16 to page 45. Upon the pleadings and evidence certain issues were framed, which issues are found upon page 48 of the record. For convenience, the answers found to these issues are inserted with the issues in the record. These issues found in favor of the plaintiff's claims and against the defendant's claims and a judgment of perpetual injunction was entered by the Court against the defendant and in favor of the plaintiff. This judgment is found on page 48 of the printed record.

A motion was made by the defendant to set aside the verdict, and award a new trial. This motion was over-ruled by the trial Court, and an appeal was taken to the Supreme Court of North Carolina. The Supreme Court of North Carolina affirmed the judgment of the lower Court, and made perpetual the injunction against defendant. The judgment of affirmance by the Supreme Court of North Carolina was made upon the second appeal of this case to that Court.

The first trial of this case was held at the April Term, 1915, of the Superior Court of Cherokee County, North Carolina, and at this first trial, a verdict and judgment was rendered against the defendant. The Supreme Court of North Carolina, upon appeal, granted the defendant a new trial. The second trial was had at the March Term, 1917, of the Superior Court of Cherokee County, North Carolina, and a verdict and judgment was again rendered against defendant; and upon appeal to the Supreme Court of North Carolina, the verdict and judgment were affirmed, and perpetual injunction granted against defendant. To this judgment of affirmance, the defendant sued out a writ of error to this Honorable Court.

STATEMENT OF QUESTIONS INVOLVED.

First: Was the charter of plaintiff Company, The Carolina-Tennessee Power Company, legal and valid, or was it unconstitutional and void?

Second: Did the grant of injunction against defendant deprive it of its property and property rights without compensation, and contrary to the Fifth Amendment to the Constitution of the United States; and did it deprive it of its property without due process of law; and did it deny it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States?

Third: Did the Supreme Court of North Carolina err in holding that, as between water power companies upon a non-navigable stream in the United States, that company is entitled to prior rights to the location upon said river which "first defined and marked its route and adopted the same for its permanent course or location by proper and authoritative corporate action?"

Fourth: Did the Supreme Court of North Carolina err in holding that plaintiff was entitled to injunctive relief in this case upon the ground that said company was not attempting to condemn any property of defendant in this cause?

Fifth: Did the Supreme Court of North Carolina err in holding that certain deeds to lands made to defendant after the commencement of this action, said deeds covering lands upon the Hiawassee River bought for its development purposes upon said river by defendant, such lands being contracted for by defendant prior to the institution of this action, were inadmissible in evidence?

Sixth: Did the Supreme Court of North Carolina err in holding that "The refusal of a non-suit was also proper, whether or not the plaintiff should have had an injunction, as it is entitled to the other relief prayed for," in view of the fact that no relief except injunctive relief was prayed for?

Seventh: Did the Supreme Court of North Carolina err in holding that plaintiff was entitled to injunctive relief, in view of the fact that plaintiff had an adequate remedy at law, and at best was only a riparian owner of land upon the Hiawassee River, and had made no actual development upon the river?

Eighth: Did the Supreme Court of North Carolina err in holding that the trial court, in its charge to the jury, committed no error in the portions of its charge complained of in Exceptions Nos. 17, 18, 19 and 20 of the Assignment of Errors for the Supreme Court of the United States?

Ninth: Did the Supreme Court of North Carolina err in holding that plaintiff was entitled to injunctive relief against defendant, in view of the gross laches of plaintiff in its conduct relative to its proposed development upon the Hiawassee River?

Tenth: Did the Supreme Court of North Carolina err in holding that plaintiff company had filed a map or survey of its locations upon the Hiawassee River, as required by its charter?

Eleventh: Did the Supreme Court of North Carolina err in holding that plaintiff was entitled to injunctive relief against defendant, in view of the fact that it had made and had offered no compensation to defendant for its property rights upon the Hiawassee River?

Twelfth: Did the Supreme Court of North Carolina err in holding that the Legislature of that State may grant the power of eminent domain to one public service corporation, without granting the same power to other corporations of like character, and may restrict such power of eminent domain to certain localities, and may modify for one corporation the general law of the State without making such modifications universal throughout the State?

Thirteenth: Did the Supreme Court of North Carolina err in refusing defendant a new trial, and in affirming the judgment of the lower court granting perpetual injunction against defendant?

THE ERRORS ASSIGNED AND RELIED UPON.

1. The Supreme Court of North Carolina erred in holding, in its decision of May 28, 1918, that the charter of the Carolina-Tennessee Power Company, granted it by virtue of a special act of the General Assembly of the State of North Carolina, was valid, said charter being invalid and unconstitutional, in that it abridges the privileges and immunities of defendant, and empowers plaintiff to deprive defendant of its property without due process of law, and deprives defendant of the equal protection of the law in that it is vicious and arbitrary class legislation contrary to the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court of Cherokee County, North Carolina, in that by its judgment it enjoined defendant, Hiawassee River Power Company, from proceeding with its development on the Hiawassee River, and in this way deprived defendant of its property and its property rights in its lands along the Hiawassee River, and

its property rights in said river, without compensation, contrary to the Fifth Amendment to the Constitution of the United States, and in this way deprived defendant of its constitutional rights, privileges and immunities.

3. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina-Tennessee Power Company, was entitled to judgment of injunction in this cause because that the undisputed evidence in this cause showed that said company owned no "water power proposition" upon said Hiawassee River and was, therefore, entitled to no judgment of injunction against this defendant to prevent its development of its "water power proposition" upon said river, which judgment deprived defendant of its property without due process of law and denied it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to an injunction against defendant, Hiawassee River Power Company, in this cause because that the undisputed evidence shows that plaintiff company had never located any dam sites or made any locations for power plants upon the Hiawassee River, and for that reason was entitled to no legal or equitable relief against defendant, Hiawassee River Power Company, and in this way said judgment denied to defendant, Hiawassee River Power Company, the equal protection of the law, and deprived it of its property and its property rights without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina-Tennessee Power Company, was entitled to an injunction in this cause because that the undisputed evidence shows that plaintiff, Carolina-Tennes-

see Power Company, had never filed any map or survey of its locations upon the Hiawassee River, as required by its alleged charter as a condition precedent to any rights it might claim upon said river, and, therefore, it had no rights, legal or equitable, against this defendant, and in this way said judgment denied to defendant, Hiawassee River Power Company, the equal protection of the law, and deprived defendant of its property rights without due process of law; all contrary to the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to injunction in this cause against defendant, Hiawassee River Power Company, because that the undisputed evidence in this cause showed the plaintiff, Carolina-Tennessee Power Company, had abandoned any purpose it may have ever had of developing a water power plant upon the Hiawassee River prior to the organization of defendant company, and for this reason was entitled to no injunctive relief against defendant, Hiawassee River Power Company, and in this way said judgment deprived the defendant, Hiawassee River Power Company, of its property and its property rights without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina-Tennessee Power Company, was entitled to injunction in this cause because that the charter of plaintiff company, under which its powers rested, was unconstitutional and void in that it conferred powers upon it to deprive the defendant, Hiawassee River Power Company, of its property without due process of law, and denied defendant the equal protection of the law; all contrary to the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of North Carolina erred in holding that the plaintiff, Carolina-Tennessee Power Company, was entitled to an injunction against defendant in this cause because that under the evidence in this cause the highest rights of the plaintiff company were those of a riparian land owner only, and as such riparian land owner it was entitled to no injunctive relief against defendant, Hiawassee River Power Company, whose lowest rights were those of an adjoining riparian land owner upon the same stream, to-wit, the Hiawassee River, and in this way said judgment of injunction deprived defendant, Hiawassee River Power Company, of its rights upon said river without due process of law, and denied to defendant equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

9. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to injunctive relief in this cause because that under the undisputed evidence in said cause, and under the law, plaintiff, Carolina-Tennessee Power Company, had a full and adequate remedy at law, and said judgment was in this respect contrary to law and in effect denied to the defendant, Hiawassee River Power Company, due process of law and the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

10. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to an injunction in this cause because that under the undisputed evidence, and under the pleadings, in this cause it was shown that the plaintiff, Carolina-Tennessee Power Company had made no offer of compensation to defendant for its property rights upon the Hiawassee River, sought to be taken by the Carolina-Tennessee Company by means of an injunction in this cause, prior to or during the

trial of this cause, and said judgment of injunction in this cause denied to defendant, Hiawassee River Power Company, due process of law and the equal protection of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and by means of said injunction deprived the defendant, Hiawassee River Power Company, of its property and its property rights upon said river without compensation, contrary to the Fifth Amendment to the Constitution of the United States.

11. The Supreme Court of North Carolina erred in holding that as between water power companies upon a non-navigable stream in the United States that company is entitled to prior rights to a location for water power purposes upon such river which "first defined and marked its route and adopted the same for its permanent course, or location by proper and authoritative corporate action;" and the Supreme Court of North Carolina erred in so holding in its first decision rendered in this cause on the 29th day of March, 1916, such original and repeated holding being unwarranted in the law, and being in effect a deprivation to this defendant, Hiawassee River Power Company, of its property rights upon said river without due process of law, and denied to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

12. The Supreme Court of North Carolina erred in holding that the Legislature of the State may grant the power of eminent domain to one public service corporation without granting the same power to other corporations of like character, and may restrict such power of eminent domain to certain localities within the State and protect other localities from its exercise therein, and may modify for one corporation the general law of the State relative to condemnation of property without making such modification universal throughout the State, such holding being con-

trary to law and in its effect denying this defendant, Hiawassee River Power Company, the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

13. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to injunctive relief in this cause upon the ground that said company was not attempting to condemn any property of defendant in this cause because that in this action the injunction granted plaintiff, Carolina-Tennessee Power Company, in effect takes away defendant's rights in its property, its lands and its rights upon said Hiawassee River for its development purposes, and in this way deprives the defendant, Hiawassee River Power Company, of its property and property rights without due process of law, and denies it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and in effect deprives defendant of its property and its property rights without any compensation, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

14. The Supreme Court of North Carolina erred in holding that certain deeds to lands made to defendant, Hiawassee River Power Company, after the commencement of this action, said deeds covering lands upon the Hiawassee River bought for its development purposes upon said river, such lands being contracted for by defendant, Hiawassee River Power Company, prior to the institution of this action, were inadmissible in evidence, it being averred that said deeds were admissible on the question of the good faith of defendant, Hiawassee River Power Company, in proceeding with its developments, and as illustrating its good faith in its development, and in support of the affirmative relief sought by defendant against plaintiff.

15. The Supreme Court of North Carolina erred in holding that "the refusal of a non-suit was also proper whether or not the plaintiff should have had an injunction as it is entitled to the other relief prayed for," because that non-suit should have been granted defendant in this cause, and plaintiff's petition prayed for no other relief against defendant except injunctive relief.

16. The Supreme Court of North Carolina erred in holding that plaintiff, Carolina-Tennessee Power Company, was entitled to injunctive relief because the undisputed evidence showed that plaintiff, Carolina-Tennessee Power Company, was not making, and had never made, any actual development of the water power upon the Hiawassee River, and nothing that defendant had done or was intending to do, would interfere with any development of the Carolina-Tennessee Power Company in progress upon said river, and in the absence of such actual development plaintiff's remedy against defendant was adequate at law.

17. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"In this connection it may be well to direct your attention to this proposition of law: In case of a contest between two corporations, which are engaged in a public utility, and are clothed with practically the same power of condemnation, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the company."

It being contended that such charge was erroneous in that

it did not state the correct law in regard to the rights of riparian land owners or proposed power companies upon a non-navigable stream prior to any actual development by either party upon said stream.

18. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"There is another principle; where a priority of right has been secured by priority of location, such prior right cannot be defeated by a rival company agreeing with the owners and purchasing the property; nor can it be defeated by condemnation; that is to say, if one rival company surveys, defines, marks and adopts the location of property which it proposes to acquire for purposes of public utility, another company cannot occupy the same territory, and defeat the claims of the first by condemnation or by purchase,"

it being contended by defendant, Hiawassee River Power Company, that such charge did not state the correct law relative to the respective rights of riparian land owners or power companies prior to any actual development by either party upon a non-navigable stream in the United States.

19. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"Now, gentlemen of the jury, what is meant by the word 'abandonment,' as used in this issue? Did the plaintiff abandon its location and proposed plans? To abandon a right or to abandon property means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon and an external act by which

such intention is carried into effect. There must be a concurrence of intention to abandon a right to property with actual relinquishment of it or giving it up. It is a well settled principle that to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title; mere lapse of time, mere delay in asserting a claim or mere period of time during which no work was done, would not be sufficient in itself to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right,"

it being contended that such charge did not state the correct law relative to an abandonment of its proposed location by a power company upon a non-navigable stream in the United States.

20. The Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County by E. B. Norvell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, or either of them for and on behalf of the plaintiff during office hours, on or about June 21st, 1911, and were there delivered to the Clerk and the Clerk was then and there informed that the maps were placed in his custody under the terms of the plaintiff's charter, that this was necessary in order to enable the plaintiff to condemn land under the charter, and the Clerk received the maps in his official custody to be kept on file in the office and that Norvell and Smith or either of them in good faith left the papers there to be kept on file as a record of the office, you will then answer the fourth issue 'Yes;' although

you may further find from the evidence that the word 'filed' was not, in fact, endorsed upon the maps by the Clerk. Unless you answer this issue 'Yes' under the instructions, you will answer it 'No,'

it being contended by defendant, Hiawassee River Power Company, that such charge did not state the correct law relative to filing of its maps and survey of its locations upon the river as required by plaintiff company's charter.

21. The Supreme Court of North Carolina erred in holding that the charter of plaintiff, Carolina-Tennessee Power Company, was valid and constitutional, because that said charter was not enacted by the Legislature of North Carolina in conformity to Section 12, Article 11, of the Constitution of North Carolina, and because that said charter had in effect been repealed by amendment to the Constitution of North Carolina, adopted in 1916, and known as Section 29 of Article 11 of the Constitution, such holding and judgment depriving the defendant, Hiawassee River Power Company, of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

22. That the Supreme Court of North Carolina erred in holding that the plaintiff, Carolina-Tennessee Power Company, was entitled to injunction in this case, and in affirming the judgment of injunction granted by the lower court, because that the evidence showed that said plaintiff company was guilty of such gross laches in its conduct relative to any proposed development upon said river as to deprive it of any right to equitable relief against the defendant, Hiawassee River Power Company.

23. The Supreme Court of North Carolina erred in holding that the trial court did not err in refusing to grant defendant's motion to set aside the verdict of the jury and

grant defendant a new trial and in awarding judgment of injunction against defendant in this action.

24. The Supreme Court of North Carolina erred in affirming the judgment of the lower court, and erred in rendering final judgment against defendant, Hiawassee River Power Company, for the reasons hereinbefore assigned.

ARGUMENT.

CHARTER OF THE CAROLINA-TENNESSEE POWER COMPANY.

The first question arising in this case is, whether the plaintiff's charter was valid, or was unconstitutional and void; and whether, in effect, this charter had been repealed by an amendment to the Constitution of North Carolina.

The plaintiff was acting as a public service corporation; its right of existence as such corporation was dependent upon its charter; without a valid charter, it could not act as a public service corporation in North Carolina, and would have no rights as a plaintiff in this injunction suit against the defendant, another public service corporation. The validity and constitutionality of the charter was attacked upon the following grounds:

First, that it gave to plaintiff company powers which abridged the privileges and immunities of defendant.

Second, that it empowered the plaintiff to deprive defendant of its property without due process of law, and denied the defendant the equal protection of the law, in that it was vicious and arbitrary class legislation.

Third, that it modified for plaintiff the general law of the State of North Carolina relative to condemnation of property, without making such modification universal throughout the State, and that, in this respect, it granted plaintiff company powers of eminent domain not granted by the general law of the State, and granted this power to plaintiff throughout the State, except in one county, to-

wit: the County of Swain in North Carolina, and was in this way a modification of the general law of the State, which modification was not universal throughout all of North Carolina.

Fourth, that it had in effect been repealed by an amendment to the Constitution of North Carolina, adopted in 1916, and known as Section 29 of Article II of the Constitution.

This charter was granted to plaintiff by special act of the Legislature of North Carolina on the 16th day of February, 1909; it gave plaintiff power to condemn other water powers and other properties, denied under the general law of North Carolina to similar companies incorporated under the general law of North Carolina. In Sections 6 and 8 of this charter, page 208 of the record, plaintiff is empowered to condemn lands and water upon any non-navigable stream in North Carolina necessary for its purposes. There is no limit upon this power of condemnation of either land or water. This power is directly in conflict with the letter and spirit of the general law of North Carolina, which prevents the condemning by one water power company of other water powers, and the condemning of certain lands, as orchards and gardens, by any water power company. (See Revisal of North Carolina of 1905, Sections 1571, 1572, 1573, 2575 and 2578; Acts of 1913 of North Carolina, Chapter 94, amending Acts of 1907, Chapter 302; Acts of 1907 of North Carolina, Chapter 74). The effect of this charter of plaintiff company is to divide the water power companies of North Carolina into two classes; one class is limited in its right of eminent domain by the general law of the State; the other class, composed entirely of this plaintiff, has unlimited power of condemnation under the eminent domain rights of its charter. Such division of the water power companies of this State is vicious and arbitrary, and the charter of this plaintiff company is unconstitutional.

as such vicious and arbitrary class legislation, under the Fourteenth Amendment to the Constitution of the United States. In this very case, both plaintiff and defendant are water power companies, incorporated under the laws of North Carolina, the plaintiff company under this special law, the defendant company under the general law. The defendant, under its charter, cannot condemn the water power of plaintiff, or of anybody else, being limited in this respect by the general law of North Carolina. The plaintiff, under its charter, can condemn the water powers of defendant and of everybody else, under this special charter. When a special charter gives these special privileges, contrary to the general law of the State, it is class legislation, which cannot be upheld, and in its effect, denies to the defendant and to every other water power company in the State, the equal protection of the law. The general law protects the plaintiff's water powers; the special law destroys defendant's water powers. The equality of the law is destroyed, and the equal protection of the law is violated, where defendant's water power is safe from condemnation under the general law of the State, and subject to condemnation under this special charter.

It is fundamental that this defendant corporation, under the Fourteenth Amendment, is entitled, so far as its property is concerned, to the equal protection of the law. (Railroad Tax Cases, 13 Fed. Rep., 722; *San Mateo Co. vs. Southern Pacific Co.*, 116 U. S., 138; *Santa Clara Co. vs. Southern Pacific Co.*, 118 U. S., 394). Equal protection of the law means that no person or class of persons shall be denied the same protection of the law which is enjoyed by other persons or other classes, in the same place and in like circumstances.

The Fourteenth Amendment further requires "That all persons subject to legislation limited as to the parties to which it is directed, or by the territory within which it is

to operate, shall be treated alike under like circumstances and conditions, both as to the privileges conferred and the limitations imposed." (*Connally vs. Union Power & Pipe Co.*, 184 U. S., 459; *Hayles vs. Missouri*, 120 U. S., 68; *Duncan vs. Missouri*, 152 U. S., 377, 382).

Again, this Court has said that: "Equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other." (*Cotting vs. Kansas City, etc., Co.*, 183 U. S., 112).

In this case, this Honorable Court has said that "every partial or private law which directly proposes to destroy or effect individuals' rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

Again, this Honorable Court has held that: "The equal protection of the laws, which by the Fourteenth Amendment, no State can deny to individuals, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that, under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held." (*Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 399).

In the Railroad Tax Cases, Mr. Justice Field, of the United States Supreme Court, sitting on circuit, said, after

quoting from Mr. Chief Justice Marshall in the Dartmouth College Case, 4 Whitney, 644: "Following that authority, we cannot adopt the narrow view for which counsel contends, and limit the application of the prohibition of the Fourteenth Amendment to legislation touching members of the enfranchised race; it has a much broader operation; it does not, indeed, place any limit upon the subjects in reference to which the States may legislate; it does not interfere with their police power. Upon every matter upon which, previously to its adoption, they could act, they may still act; they can legislate now, as they always could, to promote the health, good order and peace of the community, to develop their resources, increase their industries, and advance their prosperity; but it does require that, in all such legislation, hostile and partial discrimination against any class of persons shall be avoided; that the States shall impose no greater burden upon any one than upon others of the community, under like circumstances, nor deprive any one of rights which others similarly situated, are entitled to enjoy. It forbids a State to lay its hand more heavily upon one than upon another, under like conditions. It stands in the Constitution as a perpetual shield against all unequal and impartial legislation by the States, and the injustice which follows from it, whether directed against the most humble or the most powerful, against the despised laborer from China, or the envied master of millions." (Railroad Tax Cases, 13 Fed., 741).

The Supreme Court of North Carolina held, in its first decision in this case, that the plaintiff company's special charter, having been passed after the General Acts of 1907 of North Carolina, repealed those Acts, insofar as this plaintiff company was concerned, and that the plaintiff company had the right to condemn other water powers. Whether the Supreme Court of North Carolina considered said special act with reference to the Fourteenth Amend-

ment to the Federal Constitution, does not appear from its opinion in said case. It is respectfully submitted that the Legislature of North Carolina, having passed general laws authorizing the incorporation of electric power companies, and authorizing them to exercise within certain limitations, the power of eminent domain, the special act chartering the plaintiff company, and authorizing it to exercise the right of eminent domain without any limitation, or at least without the same limitations imposed upon it as were by the general laws imposed upon other electric power companies, was vicious, discriminative and void under the Fourteenth Amendment of the Federal Constitution.

Under the broad and general powers granted plaintiff company by its alleged charter, it would have the right not only to condemn dormant water powers, but those which had actually been developed. There is, it is submitted, no sign of reason why a water power actually developed and being used for general purposes, or even one which had been acquired and was being held for such purposes, should be taken from one company and given to another, and the public laws of North Carolina forbid this to be done in the case of all companies chartered under its general law. Can it be said that there is equal protection of the law to all engaged in like business, when one company, by special act, is given privileges which are denied to others engaged in like business, solely because they were chartered under the general law, whereas the favored company was chartered under a special law?

There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law, or to take away the security of personal liberty, or private property, for the protection whereof government is established.

Durkee vs. Janesville, 28 Wis. 468, 9 Am. Rep. 504.
Calder vs. Bull, 3 U. S. 387. 1 L. Ed. 648.

Fletcher vs. Peck, 10 U. S. 143. 3 L. Ed. 180.

Terrett vs. Taylor, 13 U. S. 50. 3 L. Ed. 653.

The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. However, since part of the liberty of a citizen consists in the enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding or selling property, the constitutional guaranty as to the equal protection of the laws requires that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits of others under like circumstances, and that no greater burdens shall be laid upon one than are laid upon others in the same calling and condition.

6 R. C. L., Sec. 394, pp. 399-400.

The clause "law of the land" when applied to special or class legislation is defined to mean law "which embraces all persons who are or may come into like situation and circumstances" and in addition that "the classification must be natural and reasonable, not arbitrary and capricious."

Harbison vs. Knoxville Iron Co., 103 Tenn., 421, 434.
5 L. R. A., 316.

R. R. vs. Harris, 99 Tenn. 684. 53 L. R. A. 921.

DeBarteleben vs. State, 99 Tenn. 648, 649.

Henley vs. State, 98 Tenn. 663. 39 L. R. A. 126.

Sutton vs. State, 96 Tenn. 695. 33 L. R. A. 589.

Can it be said that a classification that divides the electric power companies of North Carolina chartered under the general law and which are subject to the limitations

in the exercise of the power of eminent domain imposed by the public laws of 1907 and 1913, into one class, and the appellee company into another class subject to no such limitations, is natural and reasonable, instead of being, as it manifestly is, arbitrary and capricious?

It is submitted that the provisions of appellee Company's alleged charter granting it such extraordinary powers of eminent domain, which are denied electric power companies chartered under the general laws of the State, are void and unconstitutional under the Fourteenth Amendment of the Federal Constitution, and being void, said appellee Company has no right to condemn the water powers and riparian rights belonging to appellant, and a fortiori has no right to an injunction to prevent appellant from exercising its rights of ownership.

The provisions of the alleged charter of appellee Company granting it power to condemn water powers belonging to individuals and other corporations are not only void, but said alleged special act purporting to grant said charter is void in toto because it expressly exempts Swain County, North Carolina, from its provisions, and all of them. Said alleged charter by its express terms is without any operative force in said Swain County, and said appellee company has no right under its alleged charter to do business in said County.

Plaintiff's (Appellee's) Exhibit No. 1, Sec. 17, page 204 of record.

If the legislation is obnoxious because it is partial legislation, the fact that it is legislation affecting the counties of the State does not cure its viciousness, because the constitutional prohibition is as effectual to prevent partial legislation as to counties as it is to citizens.

Weaver vs. Davidson Co., 104 Tenn. 328.

Sutton vs. State, 12 Pickle 696.

Burkholtz vs. State, 16 Lea 71.

Woodward vs. Bryan, 14 Lea 520.

Miller vs. Kister, 68 Cal., 142.

Lodi Township vs. State, 51 N. J. Law 402.

Morrison vs. Buchert, 112 Pa. St. 322.

Edmonds vs. Herbrandson, 2 Dak. 270.

State vs. Wood, 49 N. J. Law, 88.

"No benefit shall be conferred or no burden imposed upon the citizens of any given county, which by the same act is not conferred upon or imposed upon all the citizens of all the other counties in the State who may be able to bring themselves, or may be brought within the terms of the act conferring the benefit or imposing the burden."

The Redistricting cases, 111 Tenn., 283.

In passing upon the validity of an act applicable to only two counties in Tennessee, the Supreme Court of Tennessee said:

"The act in question is so clearly a suspension of the general law for the benefit of the two counties mentioned as to require no argument to establish the proposition. 'The Legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general and cannot be made for individual cases or particular localities.' Cooley's Const. Lim., p. 490. The statute of limitations can not be suspended in particular cases while allowed to remain in force generally. The general exemption laws cannot be varied for particular cases or localities.

Cooley Const. Lim., p. 490, note 2, and cases cited. A law of the land is a rule embracing and affecting all persons in general, or all persons who exist or may come into a like state and circumstances, while a partial law embraces only a portion of those persons who exist in the same State and are surrounded by like circumstances. 3 Humph. 190; 2 Sneed 121. By the general law a judgment rendered against a citizen of any County of the State by a court of record is a lien upon his land in that County for twelve months from the rendition of the judgment and whoever purchases it during that time takes it subject to that lien. But by the express terms of the act in question a judgment rendered against a citizen of any County having by the census of 1870 a population of 40,000, which, as before stated, can only mean a citizen of Davidson or Shelby County, shall not be a lien upon his land affecting third persons, without actual notice, unless an abstract of the same is registered, as prescribed by said act, thus giving an immunity from the operation of the general laws affecting the rights of property to citizens of those two counties that cannot be enjoyed by and of the citizens of any of the other counties in the State. And it is by the very terms of the act utterly impossible for them ever to bring themselves within its provisions, for its operation is restricted to those counties that had a population of not less than 40,000 by the census of 1870. Hence, although other counties of the State may have acquired since that census, and might now possess, that amount of population, or double that amount, they cannot come within its provisions because they did not have the amount of population by the census of 1870."

Woodard vs. Brien, 14 Lea, 523-524.

"Class legislation is of two kinds, namely: that in which the classification is natural and reasonable, and

that in which the classification is arbitrary and capricious. Enactments of the former kind are uniformly recognized by the Supreme Court of the United States and by this Court as constitutional and valid, while those of the latter kind are by the same Courts, and with equal uniformity, condemned as unconstitutional and invalid."

State vs. Schlitz Brewing Co., 104 Tenn., 731-732.
Citing:

Petit vs. Minnesota, 177 U. S. 164.

Tullis vs. Lake Erie, etc., R. Co., 175 U. S. 348.

Orient Ins. Co. vs. Daggs, 172 U. S. 557.

Magoun vs. Illinois, etc., Bk., 170 U. S. 283.

Gulf, Etc., R. Co. vs. Ellis, 165 U. S., 150.

Lowe vs. Kansas, 163 U. S. 81.

Harbison vs. Knoxville, etc., Co., 103 Tenn. 423.

State vs. Frost, 103 Tenn. 686.

Breyer vs. State, 102 Tenn. 103.

Railroad vs. Harris, 99 Tenn. 686.

Sutton vs. State, 96 Tenn. 696, 710.

Henley vs. State, 98 Tenn., 667.

Stratton vs. Morris, 89 Tenn. 500.

Railroads vs. Crider, 91 Tenn. 490.

State vs. Alston, 94 Tenn. 674.

In the instant case Swain County is expressly exempted from the provisions of the alleged special act granting to appellee company its alleged charter. Such exemption is palpably arbitrary and capricious. Swain County lies upon or along the eastern slopes of the Appalachian range of mountains, and in it flow many streams, most, if not all of

them non-navigable. Along its southern border between it and its neighbor, Graham County, flows the Little Tennessee River, a stream just as valuable for water power perhaps as the Hiawassee. Is it a natural and reasonable classification to say that the citizens of the County of Graham are subject to have their side of the Little Tennessee River condemned by the appellee company and their actual or potential water powers taken by said appellee company, while the citizens of Swain County across said stream are exempt from having their water powers taken except under the general eminent domain laws of the State? According to the point of view, why should the citizens of Swain County be deprived of the benefits of the philanthropic activities of appellee company or exempt from its predatory conduct? Why should the citizens of every County of the State but Swain County, or the electrical power companies in every County in the State but Swain, be subject to the extraordinary powers of eminent domain granted to the appellee company, and Swain County alone be exempted from the exercise of such powers? It is submitted that such an exemption and such a classification is palpably arbitrary and capricious, and as this provision of appellee company's alleged charter applies to the whole special act and every provision of it, it renders said alleged special act unconstitutional and void. And being unconstitutional and void, appellee company not only has no right to condemn appellant's property, but a fortiori has no right to an injunction to prevent appellant from exercising the rights belonging to it as riparian owner and those granted to it by its charter under the general laws of the State of North Carolina.

As a further evidence of an arbitrary and capricious classification made by said alleged charter of appellee company, said appellee company is granted the power of exercising the right of eminent domain outside of Swain County over every kind and character of property except the burying grounds of individuals. Under the provisions of the

Revisal of 1905 defining the limitations upon the exercise of the right of eminent domain to other electrical power companies authorized to exercise the right of eminent domain, they are limited and prevented from exercising the power over the dwelling house, yard, kitchen, garden or burial ground.

Revisal of 1905 of N. C., Sec. 2578.

In other words, in delegating the power of eminent domain to electric power companies chartered under the general laws, the State prevents them from taking the homestead of the living citizen, as well as his burial place when dead. But in the case of appellee company the Legislature omitted to protect the living citizen (outside of Swain County) but did protect the dead. It is submitted that such a discrimination or attempted discrimination is likewise palpably arbitrary and capricious, and renders said alleged special act unconstitutional and void.

"An Act which exempts certain counties from its operation, while all other counties are subject to it, would be unconstitutional."

8 Cyc., 1038.

"So much of Chapter 107 P. & L. Laws of 1862 and Chapter 298 P. & L. Laws of 1869, as provides that no cost shall be recovered against the City of Janesville in any action to set aside any tax assessable or tax deed, or to prevent the collection of taxes or assessments in that city, are void."

Durkee vs. City of Janesville, 28 Wis. 464.

"Section 2 of the same chapter in terms exempts the city from any liability for injuries to persons or property incurred in any public place therein where work is being done on streets or sidewalks by contrac-

ors with the Board of Public Works, in consequence of the condition of such streets or sidewalks arising from the doing of such work, but declares the contractors liable for such injuries caused by their negligence. Held, invalid as granting to said city a special immunity against the general rule of law to which other municipal corporations are subject."

Hincks vs. City of Milwaukee, 46 Wis. 559.

1. "An Act which by its terms shall not apply to counties having a population of less than seventy-five thousand inhabitants is partial or class legislation and therefore void."

2. "Where only a part of a statute is void and the residue so dependent upon and connected with the void part that it cannot be presumed that the Legislature would have passed the one without the other, then both are void."

John Burkholz vs. State, 84 Tenn. Reports, 71.

Decisions to the same effect may be found in 16 Lea, page 71 Tennessee Reports, and in 93 Missouri, page 606.

"A statute or charter may not exempt a municipal corporation from a liability imposed by a general rule of law to which other such corporations remain subject."

Corpus Juris, Vol. 12, page 1113.

Fleming vs. City of Memphis, 148 S. W., 1057.

"A statute is void which attempts to grant to certain corporations immunity from liability for torts."

Corpus Juris, Vol. 12, p. 1113.

Milton vs. Bangor, etc. R. R., 103 Maine, 218.

Motley vs. Southern Finishing Co., 122 Maine, 347.

"A statute is void which extends the period of corporate existence of a corporation created by special law beyond that prescribed by the general laws of the State."

Corpus Juris, Vol. 12, p. 1113.

Citing Bank of Commerce vs. Wiltsie, 153 Ind., 460.

"The prohibitions contained in the State Constitution of the grant of special or exclusive privilege forbid the grant of exclusive privilege or monopolies for private benefit."

Corpus Juris, Vol. 12, 1113, citing

Washington Toll Bridge Co. vs. Buford, 81 N. C., 491.

McRee vs. Wilmington, etc., R. R., 47 N. C., 186.

"In order that legislation may be valid which applies only to portions of a State, it must apply to all persons who are similarly situated in such localities, or to all parts of the State where like conditions exist."

Corpus Juris, Vol. 12, 1113, citing

Britton vs. Board of Election, 61 Pacific, 1115.

21 N. C., 274.

"A statute is void as denying the equal protection of the laws where, without any reasonable ground for discrimination, it places limitations or restrictions on the right to engage in a particular business or occupation in one portion of the State, but not in other portions."

Corpus Juris, Vol. 12, 1151, citing

Bessette vs. People, 62 N. E. 215.

New York Sanitary Utilization Co. vs. New York City Health Department, 70 N. Y. Supplement, 510.

"Class legislation consists in those laws which are limited in their operation to certain persons or classes of persons, natural or artificial, or to certain districts of the territory of a State."

Corpus Juris, Vol. 12, 1128.

"A classification must be reasonable and not arbitrary."

Corpus Juris, Vol. 12, 1130.

It is respectfully submitted that an inspection of the authorities quoted will disclose that this charter empowering this Appellee with unusual powers except in Swain County, was vicious class legislation, legislation without reason, and was arbitrary and capricious and therefore utterly void, under the Federal Constitution.

This charter, in exempting Swain County from its operations, was in effect a modification in favor of Appellee of the general law of North Carolina relative to the grant of the right of eminent domain to water power companies. Such modification of the general law was not universal throughout the State because Swain county was exempted from such modification, and for a modification of a general law to be valid it must be of universal application throughout the State. The general law of North Carolina grants the power of eminent domain to water power companies subject to certain limitations. Among other limitations a water power company has no right to condemn other water powers or to condemn an orchard or a dwelling house or burial grounds. This general law is modified in this charter to the extent that plaintiff appellee is given the right of eminent domain over all the exceptions made by the general law of North Carolina on this subject, save as to private burial grounds. The charter, therefore, is a modification of the general law relative to eminent domain in

favor of Appellee. For such modification of such general law to be legal it must be universal over all portions of the State, and the exemption of Swain County from the operation of this modification of the general law renders the charter void.

"The Legislature may suspend the general laws of a State, but when it does so the suspension must be general and cannot be made for individual cases or for particular localities."

Cooley Constitutional Limitations, 5th Ed., page 484.

Mr. Cooley in his discussion of this question says:

"The statute of limitations cannot be suspended in particular cases while allowed to remain in force generally. The general exemption laws cannot be varied in particular cases or localities."

Cooley Const. Lim., 490, note 2 and cases cited.

It would appear unnecessary to cite further decisions and authorities to the effect that a general law cannot be modified except in behalf of all of the citizens of a State. Otherwise it of necessity becomes partial legislation in favor of or against certain citizens, and therefore void.

It is respectfully submitted that upon the two points presented this Act is unconstitutional by reason of its exemption of Swain County from its operation.

The alleged special act is vicious class legislation and not the law of the land, and is violative of the Federal Constitution because it attempts to grant to appellee company the right to pre-empt and condemn property by methods unknown to the forms of law, in that it allows it merely to "deposit" its surveys in the office of the Clerk of the Superior Court, whereas other corporations and individuals

in order to acquire priority of title to property or to give notice, are required by law either to register their conveyances or to file notice of lis pendens.

Whether such "deposit" has or can have any legal effect is hereinbefore argued; but if your Honors hold that it can have any legal effect so as to give priority to appellee company, it is here and now and in this connection insisted that such holding will of itself render said alleged special act invalid as vicious class legislation and so construe it as to make it operate as an arbitrary and capricious classification, and invalid as a suspension of the laws for the benefit of individuals in violation of the Fourteenth Amendment of the Federal Constitution.

"No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainer or lessor, but from the registration thereof within the county where the land lieth * * *."

Revisal 1905, Sec. 980, of North Carolina.

So also in regard to suits instituted in the Court affecting the title to real property, a notice of the pendency of the action or lis pendens must be filed with the Clerk in order to bind subsequent purchasers and become constructive notice.

Revisal 1905, Sec. 460, 461, 462, of North Carolina.

In other words, all other corporations and individuals in North Carolina have in order to acquire priority of right or give constructive notice, either to register their conveyances or give notice by filing their lien with justice or clerk, or by filing a lis pendens. Appellee company, on the other hand, has only to "deposit" its surveys with the Clerk

of the Superior Court in order to acquire a lien upon or priority of right to acquire any of the lands covered by such survey.

"The Legislature may suspend the operation of the general laws of the State; but when it does so the suspension must be general and cannot be made for individual cases or particular localities."

Cooley Const. Lim., 490.

And as stated in *Woodward vs. Brien*, *supra*, the Supreme Court of Tennessee said:

"A law of the land is a rule embracing and affecting all persons in general, or all persons who exist or may come into a like state and circumstances."

3 Humph. 190; 2 Sneed, 121.

It is submitted that the general laws of the State applicable to registration of conveyances, filing of liens and filing notice of *lis pendens*, etc., can no more be lawfully or constitutionally suspended for the benefit of appellee company than can the statute of limitations, or the exemption laws, and that such provision authorizing it to begin its condemnation proceedings by "depositing" its surveys is so connected with and so affects its rights of eminent domain as to render such rights unconstitutional and void.

The appellee company claims such "depositing" of its surveys gives it a priority of right to develop Hiawassee River, and operates as notice to all the world of its claims. It is desired in the present connection to point out and rely upon the claim of the appellant, that if appellee company's claim be assumed to be valid, the effect would be to make its charter operate to suspend the general laws of the State for its especial benefit, which such attempted suspension would render said charter invalid and unconstitutional.

The Supreme Court of North Carolina, in its first and second decisions, held that the charter of the plaintiff company was legal and valid. The constitutional questions presented in this brief, were presented to that Court, both in the arguments and in the briefs filed, and the unconstitutionality of this charter on the ground that it was contrary to the Fourteenth Amendment of the Federal Constitution, was likewise urged in the Superior Court of Cherokee County, North Carolina. In passing upon the validity and constitutionality of this charter, the Supreme Court of North Carolina did not specifically pass upon or decide the Federal questions made as to its constitutionality, but the questions, having been specifically made in that Court and in the trial court, are properly presented to this Court, and it is respectfully submitted that, for the reasons presented in this brief, this charter is void as being contrary to the Fourteenth Amendment to the Constitution of the United States, and this plaintiff, existing only under a void charter, could not obtain an injunction against this defendant, and the Supreme Court of North Carolina for this reason, erred in affirming the grant of injunction by the lower court.

It is further respectfully submitted that the plaintiff company's charter rights were repealed by the Amendment of 1916 to the Constitution of North Carolina.

Since the first hearing of this case before the Supreme Court of North Carolina the State has adopted amendments to its Constitution which, as appellant insists, materially affect the right, if any, of appellee to exercise the power of eminent domain over appellant's property, and in fact the law operates as a repeal of appellee's alleged charter. The amendment referred to is Section 29 of Article II, adopted in 1916, which, omitting clauses not pertinent, is as follows:

"Sec. 29. The General Assembly shall not pass any local, private or special act or resolution relating to * * * ferries or bridges, relating to non-navigable streams; relating to cemeteries; * * * regulating labor, trade, mining, or manufacturing, * * * nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it. **Any local, private or special act or resolution passed in violation of the provisions of this section shall be void.** The General Assembly shall have power to pass general laws regulating matters set out in this section."

By Section 1 of Article VIII of the Constitution, before as well as after said Section 1, Article VIII was amended in 1916, it was provided that all general laws and special acts (chartering corporations) may be altered from time to time or repealed.

By Ch. 133, Acts 1913, the General Assembly made all water power, hydro-electric power and water companies now doing business or which may hereafter engage in doing business in North Carolina, whether organized under the general or private laws of said State, or any other state or country public service companies, and placed them under the supervision and control of the Corporation Commission, and by section 2 of said Ch. 133, Acts 1913, it was provided:

"That all such companies or corporations now existing shall be required to begin active work in making their proposed development within two years after the ratification of this act, or within two years after the organization of companies or corporations chartered or formed after the passage and ratification of this act, and diligently prosecute their work on the same until it shall have been completed: And a fail-

ure to begin the work or development within the time and to diligently prosecute work on same until completion of same, as herein provided, shall be legal ground for declaring their charter rights, privileges and franchises forfeited by the States, acting through its Attorney General, upon recommendation of the Corporation Commission of this State: Provided, this section shall not apply to any company which is supplying the public and is meeting the demands of the public for its services."

Ch. 133, Acts 1913, of North Carolina.

Said Act was ratified March 11th, 1913, and effective from that date.

Ch. 133, Acts 1913, Sec. 3.

Appellee is not within the proviso of Section 2 above, for it has not supplied the public and never has supplied the public and was not in March or at any other time in 1913, before or since, meeting the demands of the public for its services.

Under the provision of the Constitution giving the General Assembly the right and power to alter and repeal general and special charters, it is submitted that if appellee was granted a special charter in 1909, as it alleges, that said Act of 1913, Ch. 133, operated in law as a modification and alteration of said charter, and required appellee to begin work of construction of its dams, etc., within two years and to prosecute said work diligently until completion, and appellee not having begun its work of construction in two years, and not having prosecuted the same diligently, has neither begun nor executed its charter rights, privileges and franchises, and said Constitutional Amendment having been adopted before its said work was begun and executed, operates as a repeal of said alleged charter.

If the Legislature can alter or repeal charters of incorporation, a fortiori the high power, or the people, can do so by means of a constitutional amendment.

Constitution N. C., Art. I, Sec. 37.

Where special charters are granted conferring peculiar privileges at a time when there is no constitutional inhibition against the creation of corporations by special acts, and subsequently such a constitutional inhibition is established, the result will be that the peculiar privileges granted by such special statutes will expire by the terms of the limitation therein prescribed.

10 Cyc. 177. 1-4.

Citing:

State vs. Lawrence Bridge Co., 22 Kan., 438, 457.

Upon the adoption of a new constitution or an amendment to a constitution, any and all laws previously existing are ipso facto null and become void, so far as they are opposed to and conflict with the new or amended constitution.

Barnes vs. Barnes, 53 N. C., 366.

McRee vs. Railroad, 47 N. C., 186.

Commissioners vs. Payne, 123 N. C., 432.

Commissioners vs. Call, 123 N. C., 308.

Norton vs. Brownsville, 129 U. S., 479, 490. 32 L. Ed. 774.

Wadsworth vs. Supervisors, 102 U. S., 534, 537. 26 L. Ed., 221.

Concord vs. Savings Bank, 92 U. S., 625. 23 L. Ed., 628.

Railroad vs. Falconer, 103 U. S., 821. 26 L. Ed., 471.

Aspinwall vs. Comrs., 22 How., 364. 16 L. Ed., 296.
 Fidelity, etc., Co. vs. Lawrence County, 92 Fed., 580.
 McKittrick vs. Ark. Etc. R. Co., 152 U. S., 495. 38
 L. Ed., 527.

The record in this case shows that appellee has done nothing whatever, either to begin active work in making their proposed development, or in prosecuting the same diligently or otherwise.

In said Act, Ch. 133, Acts 1913, "work" is used synonymously with "development", showing that the Legislature had in mind when it used the terms "work" or "development" in said act, the actual work of construction of dams, plant, etc., and not merely the acquisition of land or litigation in the way of condemnation suits, etc.

Nor has appellee at any time been enjoined by the Courts from carrying on its work, as has appellant. It has had four years in which to carry on its work, after the passage of said Act of 1913. It has done nothing whatever to that end, although said Act prescribes only two years. For three years of that four years it has had an injunction resting upon appellant inhibiting appellant from interfering with its work of plans, and although not enjoined in any way itself, appellee has still done nothing.

Appellee's charter franchises, rights and privileges are upon the record in this case, still unexecuted, and were still unexecuted when said Constitutional amendment was adopted and became effective, and it is submitted that said Constitutional amendment operates as a repeal of its alleged charter under the principles enunciated by the Supreme Court of the United States in the cases above cited.

Having no charter because of said repeal, appellee can neither condemn the property of appellant or anyone else

directly, and a fortiori cannot do indirectly by means of an injunction in equity what it cannot do directly at law, when it comes to taking under the power of eminent domain of appellant's property.

If we are correct in our belief that this charter was repealed by this amendment to the Constitution of North Carolina, then the plaintiff company had no right in the trial court below, and no right to an injunction against this defendant.

SECOND: The grant of injunction deprived defendant of its property and property rights without compensation, contrary to the Fifth Amendment to the Constitution, and deprived defendant of its property without due process of law, and denied to defendant the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution, and was unwarranted under the law and the facts.

(a) Because plaintiff was entitled to no injunctive relief against defendant, because plaintiff never owned the "water power proposition" claimed by it upon the Hiawassee River, and in the absence of such ownership it had no rights of action against defendant, and defendant had violated no rights of plaintiff. The right to such water power proposition as claimed was owned by another corporation, to-wit: the Carolina Construction Corporation.

The evidence discloses, first, that the plan or proposition for the development of the Hiawassee River was started and was originally owned by George E. Smith and his brother, Elton F. Smith, and that such plan or proposition never became the property or the plan or the proposition of the plaintiff. George E. Smith, witness for plaintiff, (see page 166 of printed record) shows that George E. and Elton F. Smith organized this plan or proposition of development; that these two brothers worked on it in 1906, 1907

and 1908, and that in 1908 they saw Mr. Ketcham in New York, and that the two brothers owned their river proposition together, and that Ketcham organized a corporation known as Ketcham & Company for the purpose of dealing in the securities of the company to be organized, and that a contract was made with the Carolina Construction Corporation, and that in New York in 1908 he traded with Ketcham relative to this "water power proposition" upon the Hiawassee River owned by his brother and himself.

Stanley R. Ketcham, a witness for the plaintiff, whose entire evidence is found on pages 52 to 74 and 172 of the printed record, testified on this point that about a year prior to the organization of the Carolina-Tennessee Power Company he became interested in the water power status on the Hiawassee River (page 63) and that he was first interested in the Hiawassee River proposition in 1908, meeting Mr. George E. Smith in New York during that year. On page 58 Mr. Ketcham testified:

"At that time (in 1908) Mr. Church owned no land on the river. Mr. Smith was the only man who had any interest in the Hiawassee River or the property on the Hiawassee River. When I met Mr. Smith in New York it was Mr. Smith's proposition, in so far as owning property or lands on the Hiawassee River. At that time Mr. Smith was the only one that I had any connection with that had any interest on the Hiawassee River. Mr. Smith saw me at my office and I told him that I would go into the proposition with him. Ketcham & Company was not organized at that time. Ketcham & Company was organized in the Spring of 1909. Ketcham & Company, the Carolina Construction Corporation and the Carolina-Tennessee Power Company were all organized practically at the same time. Ketcham & Company went out of business in 1913, when this proposition ended. Ketcham

& Company was organized for the purpose of representing Mr. Cox's interest and my interest in the Hiawassee River proposition, by a corporation rather than by a partnership. The only stockholders of Ketcham & Company were Mr. Cox and myself. Mr. Cox was president of the Construction Corporation, vice-president of the Carolina-Tennessee Power Company and president of Ketcham & Company. When we organized Ketcham & Company, Ketcham & Company took over the interest that we had in the Carolina Construction Corporation. Our interest was contained in the contract with Mr. Smith for the acquisition of property and the contract with Ambursen Company to build dams. I turned over to the Carolina Construction Corporation the agreement to turn over the property to be financed and to make a contract with the company that was to be organized. In the general water proposition to develop water power on the Hiawassee River Mr. Smith and his brother owned thirty per cent and Ketcham & Company owned fifty per cent and Ambursen Company owned twenty per cent."

This evidence discloses that the "water power proposition" for the development of the Hiawassee River was owned initially by the two Smiths; that Ketcham & Company went into this proposition with the two Smiths; that this proposition was owned in certain percentages by the Smiths and Ketcham & Company and Ambursen Company. This percentage or interest in this "water power proposition" upon this river continued and was in existence at the time of the organization of the plaintiff Company. (See page 59 of record.) The witness further testified:

"At the time the Carolina Construction Corporation was organized we did not make them any assignment of the Hiawassee River proposition. There was an agreement to transfer. We transferred to the Caro-

lina Construction Corporation all the interest that Ketcham & Company had in this proposition." (Page 59.)

And on the same page the witness testified:

"The Carolina Construction Corporation gave half of its stock to Ketcham & Company for the transfer by Ketcham & Company of its agreement with Mr. Smith. Ketcham & Company got this stock in the Construction Company for the interest that Ketcham & Company had in the water proposition. Ketcham & Company had been organized for this purpose. Ketcham & Company turned over no property to the Carolina Construction Corporation. I turned it over under that (their) order to the Carolina-Tennessee Power Company."

And on the same page the witness testified:

"Ketcham & Company transferred the Hiawassee River proposition to the Carolina Construction Corporation and the Carolina Construction Corporation became the owner of the Hiawassee River proposition under the contract between it and Ketcham & Company."

This witness then on page 60 testifies as follows:

"In May, 1909, the Carolina Construction Corporation was the owner of the Hiawassee River proposition which it had bought from Ketcham & Company and Mr. Smith. Then the Carolina Construction Corporation, the owner of the proposition, made a contract with the Carolina-Tennessee Power Company."

The evidence of this witness then, on the following pages of the record, shows the contracts and the scope of the

contracts and the purpose of the contracts between Smith and Ketcham & Company and Ketcham & Company and Carolina Construction Corporation, and the Carolina Construction Corporation and Carolina-Tennessee Power Company, and attention is specifically called to these dealings between these three corporations.

The plaintiff's Exhibit No. 2, page 214, et seq. of the record, contains the certificate of incorporation of the Carolina Construction Corporation and shows that it was incorporated with a capital stock of fifty thousand dollars on April 28th, 1909, and the purpose of its incorporation was to enter into contracts for constructing and equipping water power and electric power, and for this purpose to hold real estate and to purchase and sell stocks and bonds and to make contracts in accord with its purposes.

The first meeting of the directors of the Carolina Construction Corporation was held on May 8th, 1909. (See page 221 of the record.) At this its first meeting of directors a resolution was passed to the effect that this corporation had the opportunity of acquiring a "water power proposition" on the Hiawassee River from Ketcham & Company and others, and that the Company should accept such proposition and take an assignment of said "water power proposition" and for such assignment of such "water power proposition" pay to Ketcham & Company four hundred shares of the capital stock of the Company, and that this Company enter into a contract with the Carolina-Tennessee Power Company relative to this "water power proposition."

A study of this resolution of the directors of the Carolina Construction Corporation will show, first, that this corporation acquired the "water power proposition" on the Hiawassee River from Ketcham & Company and were to become the owners of that "water power proposition"; second, that for this "water power proposition" this corporation paid

Ketcham & Company forty thousand dollars of its capital stock; third, that this Company desired to make a contract with the Carolina-Tennessee Power Company relative to this "water power proposition"; and fourth, that this "water power proposition" belonged at this time to the Carolina Construction Corporation by reason of its purchase by this corporation and the payment to these owners for the same in stock of this corporation.

Following this resolution of the directors of this Company, a contract was entered into on the 28th day of May, 1909, between the Construction Company and the appellee Power Company. This contract is found on page 222 of the printed record. This contract specifically stipulated: "That the Construction Corporation is the owner of a water power proposition upon the Hiawassee River in the State of North Carolina and of certain lands whereon to erect a dam and water power plant and of certain lands which will be flooded for the purpose of developing said water power plant, and is about to acquire other lands and interests."

This recital was agreed to by the appellee Company when it signed the contract and it showed conclusively that at the time that contract was made the Construction Corporation was the owner of the "water power proposition."

This contract next showed that the Power Company desired to acquire "the Hiawassee water power proposition and to have the same developed and completed as a water power plant."

Carrying out the purposes of the two Companies, the Construction Corporation then agreed:

(1) That it would obtain a complete and good title to the lands necessary to erect a dam about one hundred and twenty feet in height and all lands that would be over-

flowed and would cause the same to be vested in the Power Company upon the receipt by it, the Construction Corporation, of three hundred thousand dollars par value of five per cent first mortgage bond and five hundred thousand dollars par value of the stock of the Power Company.

(2) That it would erect such a dam and a power house and install electric water power and provide the land for the storage of water, and "that it will do all other things necessary to make a complete 'water power proposition' of the size and horse power above mentioned," and that for this "water power proposition" it should receive from the Power Company two million dollar face value of first mortgage five per cent bonds and two million five hundred thousand par value of the stock of the Power Company.

(3) That it would, upon demand of the Power Company, erect another dam and acquire the real estate necessary for that purpose and erect a power house and equip it with electrical apparatus, all for the consideration of an additional two million dollars face value of first mortgage five per cent bonds and two million dollars face value of the stock of the Power Company.

The Power Company agreed to purchase the complete "water power proposition" for the considerations named in the contract.

A study of this contract will disclose that the Carolina Construction Corporation was recognized by the Carolina-Tennessee Power Company, the plaintiff, as the owner of the "water power proposition" upon the Hiawassee River and that it was contracted with to develop and complete this "water power proposition" and when developed and completed to deliver it to the Carolina-Tennessee Power Company for the bonds and stocks named in the contract. Under this contract the "water power proposition" never

passed from the Carolina Contruction Corporation to the Carolina-Tennessee Power Company. It was never developed; it was never completed; it was never built as provided for under the contract, and the title to the "water power proposition" has never by any instrument passed from the Carolina Construction Corporation, but is still the property of the Carolina Construction Corporation.

At the first meeting of the incorporators of the appellee Company (pages 218 of the printed record) a resolution was passed in the following language:

"Whereas, this corporation was formed among other things for the purpose of acquiring water power and electric plants and developing and equipping the same; and

"Whereas, the Carolina Construction Corporation (a New York State corporation) is the owner of a water power proposition upon the Hiawasse River in the County of Cherokee, North Carolina, and is willing to and desirous of disposing of the same to this corporation, and has also proposed to this corporation that it would erect such dams, power houses and buildings as might be necessary to develop the said water power proposition, and would acquire and convey to this corporation all of the lands necessary for such development and will install the electrical and other apparatus necessary to provide a complete operating plant, in consideration of the issue and delivery to it of bonds of this corporation and \$4,990,000 of the capital stock; and

"Whereas, it is considered to the best interest of the corporation to accept such proposition, which has been submitted to this meeting in the form of a proposed contract;

"It is now unanimously resolved that the directors of this corporation are authorized to enter into an

agreement with the Carolina Construction Corporation to do the work proposed in such agreement for and in consideration of the issuance and delivery to it of the bonds and stock in said contract provided, and to issue and deliver the stock and bonds to said Carolina Construction Corporation as in said contract provided."

It was under this resolution that the contract found on pages 222, et seq., of the record was entered into. Under this resolution the plaintiff Company expressly recognized that the Carolina Construction Corporation "is the owner of a water proposition upon the Hiawassee River." The ownership of this "proposition" has never passed out of the Carolina Construction Corporation.

At the first meeting of the directors of the appellee Company held on May 28th, 1909, another resolution was passed relative to this contract between the two Companies, and in that resolution the following language was used:

"Whereas, the Carolina Construction Corporation is the owner of certain real estate upon the Hiawassee River in the State of North Carolina, with water power rights and privileges, and proposes to acquire other real estate necessary for the water power and electric development and to erect thereon certain dams for water reservoir purposes and to build a power house and equip the same with water and electrical apparatus, and do all other things to make a complete electric water power plant."

This language in this resolution shows again a recognition by the directors of the appellee Company that the Carolina Construction Corporation was the owner of the real estate upon the Hiawassee River with water power rights and privileges, and that this "water power proposition" belonged to the Carolina Construction Corporation.

The title to this proposition, so recognized, has never passed out of the Construction Corporation. The contract was never carried out by either the Construction Corporation or the Power Company. The necessary lands were never acquired by the Construction Corporation. The dam was never built. The power house was never erected and the electric apparatus was never installed. The title to the "water power proposition" under the dealings between the two Companies never passed out of the Construction Corporation. If the plaintiff has any rights in the matter, it is a right for damages for breach of contract against the Construction Corporation, or for action for specific performance against the Construction Corporation. It has no right as the owner of the "water power proposition" upon the Hiawassee River against this defendant because it is not the owner of such proposition. The owner of that proposition is the Carolina Construction Corporation. This contract has never been cancelled between these two Companies!

The witness Ketcham on page 60 of the record says:

"The Carolina Construction Corporation is still carrying out this contract, so far as I know. As the water power proposition now belongs to the Construction Corporation, it is under contract to be delivered to the Carolina-Tennessee Power Company when it is completed. I know of nothing being done to abrogate the contract between the Power Company and the Construction Company. The Carolina-Tennessee Power Company still relies on the Construction Corporation. I am still secretary of the Construction Corporation. This contract between the Construction Corporation and the Power Company is extant and I know of nothing that has been done to abrogate it."

The witness Ketcham endeavored on the day following the day on which he had given the evidence just quoted to weaken his evidence, and on page 88 testified:

"The question that Mr. Black (attorney for defendant) asked me with reference to the Carolina Construction Corporation was left in a rather indefinite way. He asked me if any action had been taken or if the contract between the Power Company and the Construction Corporation was still in existence and I told him that so far as I knew no legal action had been taken to abrogate that contract, but after Mr. Powellson and Bertrand, Griscomb & Company had taken control of the securities, they ignored the Carolina Construction Company. I am an officer of the Carolina Construction Corporation. I said they did not take any action; they ignored it. No legal action was taken to abrogate the contract. They brought no suit. No final release has ever been executed between the parties. That is what I meant this morning when I said the thing was left in an indefinite manner."

And in his recross examination on page 69 the witness admitted his prior testimony relative to the intention of the Carolina Construction Corporation to carry out the contract, but added that the Carolina Construction Corporation could not carry out its contract. The fact remains undisputed, however, that the contract between these two corporations is in existence; that it has never been abrogated by any corporate action on the part of either corporation, and that under this contract the Construction Corporation is the owner of the "water power proposition."

In this situation, not being the owner of the "water power proposition" upon the Hiawassee River and being estopped by its contracts from denying the ownership in the Construction Corporation, the plaintiff corporation has no right on injunction against this defendant, because it has no right or title to any "water power proposition" upon the Hiawassee River, and the acts of the defendant cannot interfere with alleged rights of the plaintiff which, as to the

plaintiff, do not exist, but which, if existant, are the property rights of a different corporation.

(b) Because plaintiff had never located any dam sites or made any locations for power plants upon the Hiawassee River.

THE EVIDENCE DISCLOSED THAT THE PLAINTIFF COMPANY HAD NEVER LOCATED ANY DAM SITES OR MADE ANY LOCATIONS FOR POWER PLANTS UPON THE HIAWASSEE RIVER.

The question of any priority of its location was submerged in the fact that it had never made any location nor any survey relative to any location. The only location of any dam sites ever made and the only survey in connection with such locations ever made were made by and for the Carolina Construction Corporation. A survey was made for certain dam sites and locations on the Hiawassee River by T. H. Verdell in 1909. The evidence of this witness Verdell shows exactly what was done relative to this location of dam sites and the survey in connection with it. This is the only location and survey ever had in connection with plaintiff's claimed dam sites and locations. This work was not done by the plaintiff. It was done by the Ambursen Company under employment by the Carolina Construction Corporation and was done for the Carolina Construction Corporation and not for the plaintiff Company. It was done in connection with the Construction Corporation's "water power proposition." It was started prior to the contract between the Construction Corporation and the Power Company. The result of Verdell's work belonged, not to the Power Company, but to the Construction Corporation, and the location of dam sites by Verdell and the surveys in connection with those dam sites by Verdell were

locations and surveys made for the Construction Corporation. The Power Company never employed Verdell. They never compensated Verdell. They never compensated Verdell's master, the Ambursen Company. The Ambursen Company was compensated by the Construction Corporation for Verdell's work. The Power Company had no interest in Verdell's work save as part of the completed "water power proposition" which it contracted to purchase from the Construction Corporation, which it never purchased, which was never completed by the Construction Corporation and never tendered or sold to the Power Company. Until the Power Company becomes the owner of the completed "water power proposition" which it contracted to purchase from the Construction Corporation, it cannot claim the location of any dams or the making of any surveys upon this river. As a matter of fact, it never made any locations of dams or developments upon the river. It simply contracted to purchase such locations from their owner, the Construction Corporation.

Attention is here called to the first issue which was submitted to the jury. (Page 174 of printed record.) This first issue is as follows: Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A? This issue was answered "Yes" by consent of counsel.

The attention of the Trial Court was called to the fact that the locations for the dams, reservoirs and public works were not located by the Carolina-Tennessee Power Company, but were located by the Carolina Construction Corporation, and it was agreed by Judge Adams, the Trial Judge, and by counsel for plaintiff and counsel for defendant that the locations

referred to in this issue were the locations made by the witness Verdell and referred to no other locations, and the issue submitted was not whether the plaintiff Company had made locations for its dams, reservoirs and public works, but whether locations were made by anybody of the dams, reservoirs and public works claimed by the plaintiff, and the issue was answered yes because it was expressly understood that the issue was so limited and referred only to the locations made by the witness Verdell, and was further limited to such locations as were alleged in the complaint and as were indicated on the maps offered in evidence marked Plaintiff's Exhibit 7 and 7-A. This explanation is given relative to this issue in order that the mind of the Court might not be confused to the point that it would think that defendant had consented that an issue be found that the plaintiff had made any locations of its dams, reservoirs and public works. The issue did not contemplate this, but contemplated only the physical fact of the location of such dams, reservoirs and public works in 1909 by the witness Verdell, and the question as to what corporation he was locating them for was not determined by the issue, and it is undisputed that Verdell was working for the Ambursen Company, an engineering company employed by the Construction Corporation to do this work. It follows necessarily that the plaintiff never located any dams, reservoirs or public works, but that they were located by the Construction Corporation and never inured to the benefit of the plaintiff, and are still owned by the Construction Corporation and were never owned by the plaintiff; that the plaintiff never located any dams, reservoirs and public works, and never having located them, was not entitled to injunctive relief against this defendant by reason of any such location, plaintiff's rights being primarily dependent upon its having made locations of dam sites and for power plants.

(c) Because plaintiff had no rights under its charter, because it had never filed the map or survey of its locations as required preliminary to any rights under its charter.

THE CHARTER OF PLAINTIFF COMPANY REQUIRED THAT PLAINTIFF COMPANY, PRIOR TO CONDUCTING ITS BUSINESS AS A PUBLIC UTILITY COMPANY, SHOULD FIRST DETERMINE ITS LOCATIONS AND FILE A SURVEY OF THEM IN THE OFFICE OF THE CLERK OF THE SUPERIOR COURT OF THE COUNTY IN WHICH THE LAND LIES, AND THAT SUCH SURVEYS SHOWING LOCATIONS WERE NEVER FILED BY PLAINTIFF COMPANY IN THE OFFICE OF THE CLERK OF THE SUPERIOR COURT OF CHEROKEE COUNTY.

The provision requiring such filing of such survey showing such location is contained in Section 8 of plaintiff's charter. (See page 204 of the printed record.)

The evidence discloses that no such surveys were ever filed with the Clerk of the Superior Court. The plaintiff company was organized in 1909. It never had any survey made showing the location of its work. The only surveys ever made showing any locations were the surveys made by Verdell in 1909 for the Ambursen Company, acting for the Construction Corporation. Two such surveys were introduced in evidence, known as plaintiff's Exhibits 7 and 7-A. The evidence disclosed that they were never filed with the Clerk. The witness Norvell (page 88, et seq. of the record) claimed that the two surveys of the upper reservoir and the lower reservoir of the plaintiff Company were sent to him in 1910 at Murphy, North Carolina; that he kept them in his office until June, 1911. Up to that time they had never been taken to the Clerk of the Superior Court. He testified that in June, 1911, he and George E. Smith, the vice-president of the plaintiff Company, carried

these two surveys to the Clerk of the Court and deposited them with the Clerk of the Court stating that it was necessary to deposit them for the purpose of authorizing the plaintiff Company to start certain condemnation proceedings. A fair interpretation of Norvell's evidence is to the effect that these maps were allowed to stay there a few days and were then taken out by Norvell and carried back to his office and never got back to the Clerk's office again until July, 1914, when they were found in the Clerk's office on a rack in the vault. There had never been any record in the office of their filing. They are not marked filed to this day, nor is there any record in the Clerk's office showing that they were ever filed. The Clerk testified that he had no recollection of the maps ever being brought to his office or ever being deposited with him; that they were never filed or marked filed; that it was his invariable rule to mark filed all papers filed with him and that if these maps had been filed they would have been marked filed. This is the gist of the evidence of A. A. Fain, Clerk of the Superior Court, found on page 160 of the printed record.

The Deputy Clerk, H. A. Fain, in his evidence on page 164, testified that shortly prior to the time the two surveys were found in the vault of the Clerk's office by agents of the plaintiff in July, 1914, just before the petition in this case was filed, he, the Deputy Clerk, had made a search of the office and of the vaults for these surveys and they could not be found. They were found there just before the petition in this case was filed by the agents of the plaintiff.

In this state of the evidence it is respectfully submitted that as a matter of fact the surveys claimed were never filed and as a matter of law they were never filed. As a matter of fact and of law, they were never filed, because they were never marked filed and there was never any record made in the Clerk's office of their filing. The charter

of the plaintiff Company gave it extensive powers. It was not a charter granting them a right upon the Hiawassee River. It was a charter granting them a right upon any stream in North Carolina. As a prerequisite to this right the Legislature required them to make a survey showing the location of their works and file that survey with the Clerk. There could have been but one object on the part of the Legislature in requiring such filing and that object was to give notice to the public of such location of its works. This notice could not be given to the public, and the public as a matter of law must remain in dense ignorance of such location of such works, unless and until surveys showing such locations were filed in the office of the Clerk of the Superior Court and a record made in that office of such filing, which would be notice to the public of such filing and of such location. It was never claimed by the plaintiff that the surveys were marked filed or that there was any record of such filing made. It was simply claimed that they were handed to the Clerk with the statement that they must be deposited with him prior to the bringing of certain condemnation suits. If the evidence of the plaintiff as to the filing of these surveys is to be accepted, then it follows that under that evidence there never was a filing of these surveys as contemplated by the Legislature in the grant of its charter. There was never any filing marked upon the surveys. There was never any record of such filing made in the office of the Clerk, and there was nothing to give the public any notice of such location, and the giving of such notice could have been the only object of the Legislature in making this prerequisite requirement in the charter of the Company.

The Supreme Court of North Carolina in its first decision in this case decided that the filing of such surveys was a prerequisite to the right of plaintiff to the relief sought in this case. Under the charter the filing of such surveys is fundamental to its right upon this river.

As indicating the effect that a proper filing of this survey would have had as notice, the attention of the Court is called to the evidence of the witness J. P. McMullen, page 140 of the record. He was the original agent of Van Deventer to secure options on this river. He ran across some old options, which by their terms had expired, which had been taken by the Carolina-Tennessee Power Company. He testified that he requested his attorney "to see if he could find a map of the Carolina-Tennessee Power Company property. I am acquainted with Mr. A. A. Fain, who was Clerk of the Court at Murphy. I called at his office to see if there was a Carolina-Tennessee Power Company map on file and asked Mr. Fain about the map and he said there was no map there and never had been. That was, I should say, in December, 1912, something like that."

If the map had been legally filed, McMullen would have discovered it at that time and it would have given him and Van Deventer the notice required by the charter which was prerequisite to the validity of the location of the works upon the Hiawassee River claimed by the plaintiff.

If the maps claimed to have been filed could possibly in law be said to have been filed, they were not such maps and surveys as were required by the charter of the plaintiff Company as a prerequisite to the operation of the plaintiff Company upon the Hiawassee River as a public utility corporation. The charter required that a survey showing the location of the works should be deposited in the office of the Clerk of the Court. The two maps claimed to have been deposited with the Clerk were not maps showing the location of any works. The two maps were named "Lower Reservoir Map of the Carolina-Tennessee Power Company" and "Upper Reservoir Map of the Carolina-Tennessee Power Company." They were property maps and were so named and so marked. They were maps showing the extent of the river from the Tennessee State line thirty-one miles up to

Murphy. The upper reservoir map had a cross mark on the river at Beaver Dam Creek. This cross mark was not marked "dam site", nor was there any location of any power houses or reservoirs shown at that point on the map. There was no location of any works as required by the charter shown on this map of the upper reservoir. It was simply a property map, showing the course of the river with the names of the property owners on the map, and nobody on earth could have looked at that map and had any notice that the plaintiff Company intended to erect a dam and power house and make a development in connection with that map or survey; nor could an inspection of that map have informed anybody of the purpose of the plaintiff Company relative to the location of its works along the river at any point shown on that map. The lower reservoir map was similar to the upper reservoir map. It was a property map. It showed no location of any works and no location of power house or reservoir or dam. It simply showed the course of the river and property along the river and the names of the owners of the property along the river, and this map did not even have a cross mark in the river to show the location of a dam anywhere along the course of the river, and certainly not in or near Appalachia, where they claimed the dam for the lower reservoir was to be placed. This map could have given no notice to the world of the purpose of the location of works of the plaintiff Company at any point on the river shown by that map. The object of the survey to be filed was to give notice of the location of the works of the plaintiff. Neither of these maps gave any such notice. Neither of them showed the location of any works and one of them did not even have a cross mark upon it where it could be claimed a dam was to be erected. These two maps, plaintiff's Exhibits 7 and 7-A, were left in the Clerk's office, if at all, for only a few days and were then taken out and kept out of the Clerk's office for three years. They were never kept on file.

To be legally filed papers "must be delivered to the proper officer and by him received to be kept on file."

See *Franklin County vs. State, Ex rel. Patton*, 3 Southern Rep., 471, 474.

Masterson vs. Southern Ry. Co. (Ind.), 82 N. E. Rep., 1021.

These maps were never filed for record, as was the purpose of the requirement of plaintiff's charter.

"An instrument is filed for record when it is filed in the proper office with the person in charge thereof with direction to record it."

See *Edwards vs. Grand et ux.*, 53 Pac. Rep., 796, 797 (Cal.).

Tregambo vs. Mining Co., 57 Cal., 501.

These maps were never marked filed, nor were they ever treated by the Clerk as filed. To be filed one or the other of these two things must certainly have been done.

"A paper is filed by lodging it with the Clerk of the Court, and the Clerk's endorsement, being evidential only of the fact of time and filing, is not essential to give validity to the filing, where the Clerk and the Court have treated the paper as filed."

Ray & Coughton Lumber Co. vs. Mack, 69 S. W. Rep., 712, 713 (Ky.)

Measured by the latest decision of the Supreme Court of North Carolina these maps cannot be said to have ever been legally filed. In the case of *McHan vs. Dorsey*, 92 S. E. Rep., 598, this Honorable Court held that a chattel mortgage was not filed until the Clerk made a record of it. In the first headnote is the following language:

"The delivery of a chattel mortgage to the Register of Deeds outside his office is not a filing, and becomes such only when the Register carries it within his office and makes a record thereof."

And in the decision this Court says:

"To constitute a valid filing for record the instrument must be delivered at the registrar's office where the law requires it to be filed. The delivery of these mortgages to the Registrar of Deeds outside of the Registrar's office was not a filing. The filing took place when that officer carried them within the office and made the notations."

Plaintiff's charter requirement that these maps showing location of works should be filed could not have been less than to provide constructive notice to the world of its locations. The Courts of this State will not require less to be done by this plaintiff Company in completing such constructive notice than is required of its citizens relative to lands and suits, and yet the law of North Carolina requires the filing for record of conveyances and suits in order to create constructive notice.

N. C. Revisal of 1905, Sections 460, 461, 462, 980.

Measured by these statutes the plaintiff's charter requirement to "deposit" plainly means "filing," for this Company would not be selected by the Legislature of North Carolina as one corporation where the rule as to constructive notice required of all citizens would be waived or weakened. It is respectfully submitted under this Statute law as applied to the facts of this case, there was no way by which such required notice could be given to this appellant either of the existence of the maps or the locations of any works by plaintiff Company.

It is respectfully submitted that injunction in this case should not have been granted by reason of the fact that these maps were not maps as contemplated by the Legislature in the requirements in the charter of the plaintiff Company, and that if they were such maps they were never filed as required by the charter and by the law of North Carolina concerning the filing of papers in the Clerk's office at Murphy, and without such filing plaintiff had not complied with the prerequisites of its charter and had no rights to any locations upon the river, and in the absence of such rights could not enjoin this defendant.

(d) Because the plaintiff had abandoned any purpose it may ever have had under its claimed development upon the Hiawassee River.

THE PLAINTIFF, PRIOR TO AND AT THE TIME OF THE ORGANIZATION OF DEFENDANT COMPANY, HAD ABANDONED ANY PURPOSE IT MAY EVER HAVE HAD UNDER ITS CLAIMED DEVELOPMENT UPON THE HIAWASSEE RIVER.

This "water power proposition" claimed by the plaintiff was started in 1906 by George E. Smith. He fooled with it for two years. In 1909 it was purchased by Ketcham & Company. In that same year it was sold by Ketcham & Company to Carolina Construction Corporation. After the organization of Ketcham & Company and the Carolina Construction Corporation and the Carolina-Tennessee Power Company, there followed a long series of manipulations between these three companies. The stock of Ketcham & Company was issued, based on this "water power proposition". Stock of the Construction Corporation based on the same proposition was issued and stock of the Power Company based on the same proposition was issued. The Construction Corporation invested about fifty-two thous-

and dollars in lands along the Hiawassee River. In 1910 it had practically finished its investment. At that time it had not acquired a dam site at any point on the river. It did not own the land on both sides of the river at either its alleged upper dam site or its alleged lower dam site. It had no money with which to further the proposition. The proposition lay practically idle in 1911, 1912 and 1913. In 1913 the plaintiff Company was put in the hands of a Receiver by its attorney and agent, E. B. Norvell, and a Receiver was appointed for its affairs. It was put into the hands of a Receiver on the ground of its insolvency. It was in the hands of a Receiver at the time Van Deventer, acting as developer of defendant Company, was launching his proposition and acquiring lands necessary for its development. It remained in the hands of a Receiver until a short time prior to the incorporation of defendant Company in July, 1914. When defendant Company was organized, when it took over the lands purchased by Van Deventer, when it owned dam sites, when it was in process of making a contract for the construction of a dam, when it was having its dam sites core drilled, when it was proceeding in every way with its development, the plaintiff Company for the first time in years became active and its first activity through a period of several years was the filing of this petition to stop this development by defendant Company. It had done nothing from 1906 to 1914, a period of eight years, towards its real development. The river was in the same state it was in when George Smith started his proposition in 1906. So far as the public was concerned and so far as the plaintiff corporation itself was concerned, there had been a complete abandonment of any development it might ever have contemplated.

In this state of abandonment the defendant Company appeared with its plan of development. The only excuse for plaintiff's non-development was that it never had the money with which to develop it. The evidence disclosed that it had not raised a dollar since the witness Powellson

came into it and that it did not now have a dollar with which to develop it. It was simply a stock jobbing proposition from the beginning in 1909 up to the date of the trial. If it ever had any prior location it had abandoned it and had forfeited it.

The first decision in this case by the Supreme Court of North Carolina held that that water power company which first located its works upon a river was entitled to priority over a subsequent corporation which might locate works upon the river, but in that decision it was held that such priority of location, in order to be effective, must be followed up within a reasonable time by development, and we claim in the spirit of that decision that if this Company ever had any prior location over the defendant, it forfeited it by reason of its failure to follow it up within a reasonable time, or within an unreasonable time, with any development. It has never made any development and its failure to make any development must in law be considered an abandonment of its proposition. There can be no other fair conclusion reached. The charter powers of the plaintiff are extensive. They give the plaintiff a right on every non-navigable stream in North Carolina except in the County of Swain. The plaintiff could tie up every water power in North Carolina under its charter by filing a survey of its locations at different points. Surely the law will not allow it to so tie up the water powers of North Carolina, and surely its charter powers, extensive as they are, are limited to those cases where the plaintiff in good faith makes a location and within a reasonable time follows it with development.

A bare perusal of the evidence in this case will disclose that this plaintiff, from its inception to the present date, has never been able to develop, has never attempted to develop, has never developed and cannot now develop, any contemplated water powers on the Hiawassee River. It

took options for necessary lands which it allowed to expire. It failed to pay its debts and went into the hands of a receiver. It has never, up to the time of the organization of this defendant Company, acquired a dam site—that is, land upon both sides of the river at any contemplated dam site. It has never made a contract for the construction of a dam. It has never constructed a dam. Its actions bespeak its abandonment. The evidence in this case must be construed as showing that this plaintiff has not within a reasonable time followed up its claimed locations and by all of its acts has abandoned any real intent to develop the water power upon the Hiawassee River, and it cannot enjoy the defendant from developing an abandoned proposition.

(e) Because plaintiff's highest rights were those of an adjoining riparian owner, and as such it was not entitled to injunctive relief.

THE EVIDENCE DISCLOSED THAT PLAINTIFF'S HIGHEST RIGHTS COULD ONLY BE CONSIDERED AS THOSE OF A RIPARIAN LAND OWNER, AND THAT AS A RIPARIAN LAND OWNER IT WAS NOT ENTITLED UNDER THE EVIDENCE TO INJUNCTION AGAINST THE DEFENDANT.

If our proposition is correct that the plaintiff Company never owned a "water power proposition" upon the Hiawassee River, and yet it held title to certain land along the Hiawassee River, the title to which had been put into it by the Carolina Construction Corporation, it may be considered only as a riparian owner and not as a public utility company with the rights coincident to a public utility company.

It then follows that it was not entitled to an injunction against the defendant, whether the defendant had ever located its dam sites and its works by proper corporate action,

or whether it be considered only as another riparian owner. If, as we contend, the defendant Company had a right as a public utility corporation and had established its dam sites and locations by proper corporate action, certainly the plaintiff, merely by reason of the fact that title to certain land along the river was vested in it, and, shorn of its public utility character, by reason of the fact that the "water power proposition" which it claimed was owned by another, would have no right of injunction against the defendant. If neither the plaintiff nor the defendant had properly located its dam sites and taken proper corporate action, then each must be considered only as a riparian owner, and in this view the plaintiff would not be entitled to injunction against the defendant.

The most favorable view that can be given to the plaintiff corporation under the evidence and a view which may arise by reason of the fact that title to certain land was vested in it, though the land was paid for by the Carolina Construction Corporation, is that the plaintiff was a mere riparian landlord. The most unfavorable view which may be accorded the defendant under the evidence is that it had not by proper corporate action located its dam sites and works and it therefore was only a riparian owner.

With this statement it must always be borne in mind that up to the filing of this suit the plaintiff Company had never acquired the land on both sides of the stream at either of its dam sites, and defendant Company had acquired the land on both sides of the stream at both of its dam sites. By reason of plaintiff's failure to acquire the land on both sides of its dam sites, it had never even become a potential water power company. It has never acquired the land at its Appalachia sites, a portion of which lies in Tennessee, and at that site it does not to this day claim to own the land except on one side of the river. At its other site known as Beaver Dam Mill Site, it owned on one side of the river

and attempted to acquire land on the other side of the river after condemnation proceedings against this land, known as the Fowler land, had been instituted by the defendant and of necessity purchased the said Fowler lands subject to such condemnation proceedings, such proceedings constituting a *lis pendens* against the land and the acquisition of the land being had subject to such *lis pendens*. The defendant Company owned the land on both sides of the river at its two proposed dam sites, to-wit: Shoal Creek and the Coleman dam sites, and if it be conceded that both Companies are riparian owners of land lying along Hiawassee River, it follows that the appellant Company is the owner of two potential water powers and the appellee Company is the owner of neither of the two claimed by it.

In this state of ownership the appellee Company, as plaintiff, filed its injunction bill against the appellant Company as defendant, claiming priority of right to develop the water power upon the Hiawassee River and claiming that the proposed development of the water power upon that river by appellant Company was inconsistent with the development proposed by the appellee Company, and based its prayer for injunction upon this proposition.

We beg to submit that if this was a contest between riparian owners only, then their respective rights were subject to the laws in force in North Carolina. The common law is the law of North Carolina with reference to the rights of riparian owners.

Pugh vs. Wheeler, 19 N. C., 50.

Unless the appellee Company was by its charter expressly granted exclusive rights upon the Hiawassee River, then as a riparian owner only the principle of the common law governing the rights of riparian owner must govern and control the rights of the plaintiff in this case. There is no such exclusive right given to the plaintiff in its charter.

Public grants are to be construed strictly and in such grants nothing passes by implication, and they are to be construed in favor of the grantor.

U. S. vs. Arredondo, 31 U. S., 736.

Charles River Bridge vs. Warren Bridge, 36 U. S., 545.

No principle is better settled than that all charters granting special privileges or powers must not only be strictly construed, but must be construed most strongly against the grantee.

Railroad vs. Reid, 64 N. C., 155, 158.

Commissioners vs. Call, 123 N. C., 315.

While the appellee Company is by its alleged charter granted numerous and broad rights as to development of water powers and other property in North Carolina and elsewhere, it is not in express terms given exclusive rights of development over any of the streams or rivers of said State. It is conceded that the Hiawassee River is a non-navigable stream. It is submitted, therefore, that the principles enunciated by Chief Justice Ruffin, of the Supreme Court of North Carolina, in the case of Pugh vs. Wheeler, apply to and govern the rights of the parties as riparian owners in this case, provided the defendant can in any view be considered only as a riparian owner. In that case Chief Justice Ruffin said:

"We conceive, therefore, that it is clear doctrine of the common law that all owners of land through which a stream, not navigable, run, may apply it to the purposes of profit. * * * And as between them the use to which one is entitled is not that which he happens to get before another, but it is that which by reason of his ownership of land on the stream, he can enjoy on his land and as appurtenant to it.

And as that right is equal in each owner of the land, because each can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages, which natural advantages as appurtenances to the soil the other can insist on at all times, until he shall have granted them away, or until here as in England, a grant is presumed from enjoyment for twenty years."

Pugh vs. Wheeler, 19 N. C., pages 55 and 60.

This case of Pugh vs. Wheeler is the leading case in the United States on the respective rights of riparian owners. It was decided in 1836 and has been cited with approval and followed in a long line of cases since that date, among which are:

Wilburn vs. Burleyson, 106 N. C., 389.

Gerenger vs. Simmons, 24 N. C., 233.

Beaty vs. Connor, 34 N. C., 342.

Johnston vs. Roane, 48 N. C., 524.

State vs. Glenn, 52 N. C., 334.

Burnett vs. Nicholson, 72 N. C., 335.

State vs. Pool, 74 N. C., 408.

Walton vs. Mills, 86 N. C., 282.

Goodson vs. Mullen, 92 N. C., 211.

McLaughlin vs. Mfg. Co., 103 N. C., 107.

Wilburn vs. Burleyson, 106 N. C., 389.

Adams vs. Railroad, 110 N. C., 330.

Geer vs. Water Co., 127 N. C., 354.

Mullen vs. Canal Co., 130 N. C., 503.

Lewis in his work on Eminent Domain cites this case of Pugh vs. Wheeler with the case of Heath vs. Williams, 25 Maine, 209, for the general principle that:

"At common law there can be no question of priority, since one person has no right to interfere with the flow of a stream upon another's land and cannot acquire such right except by agreement with the owner or adverse possession for the requisite period."

2 Lewis Em. Dom., Sec. 305, p. 749.

As a general rule, where a principle of law has become settled by a series of decisions it is binding on the courts and should be followed.

11 Cyc., 745.

If it be argued that in the first decision of North Carolina Supreme Court in this case it was determined that as between these two Companies priority of location should be the determining factor as to the respective rights of the two Companies, then it is respectfully submitted that that decision was not based upon the assumption that the rights of the respective parties, in view of the evidence adduced, should be considered only as the rights of riparian owners.

To this part of the first decision of the Supreme Court of North Carolina we have specifically assigned error in this appeal.

See Assignment of Error page, paragraph 11.

If in view of the evidence it is determined that the rights involved are the rights of riparian owners, this court would follow the old decisions respecting such rights and would not apply novel principles which may be applicable to contests over rights of way of railroads and questions of priority involved in such contests, but which have and can have no application to rights of riparian owners of lands lying along non-navigable streams.

In the first decision in this case the Supreme Court in support of the principle laid down to the effect "that in the

absence of statutory regulations to the contrary, the prior right of appropriation of water rights belongs to the company which first defines and marks its route" cited with approval Lewis on Eminent Domain.

It is submitted that the principle enunciated by Lewis: "Where a conflict arises out of rival locations over the same property by companies acting under general powers, that one is entitled to priority which is first in making a complete location over the property, and the relative dates of their organization or character are immaterial" (2 Lewis Em. Dom., Sec. 306, p. 749) and approved by the Court in language applying the principle to water power companies, is supported by Lewis by citations to cases involving railroads rights of way only.

The opinion by Judge Shiras, also quoted by Supreme Court of North Carolina in its first decision, in the case of Sioux City R. Co. vs. Chicago R. Co., 27 Fed., 770, was also a case involving a contest over railroad rights of way. It is respectfully submitted that there is no analogy between railroad rights of way and the rights of riparian owners either in their nature or in the manner of their use.

In the opinion of Judge Shiras just quoted he said: "The right to use the right of way is a public, not a private right. It is in fact a grant of power from the State." This related to a railroad right of way.

In Pugh vs. Wheeler Justice Ruffin defined the right of a riparian owner as one which, by reason of his ownership of land on the stream he could enjoy on his land and appurtenant to it. The railroad right of way is a public right. The right of a riparian owner is a private right, which belongs to the owner upon the stream as an incident of ownership and is in no way dependent on a grant from the State. It is like any other right incident to the ownership of pri-

vate property in land, and belongs to such riparian owner as much as does the right to cultivate the soil.

The North Carolina Court has drawn this distinction:

"To our minds there is too little resemblance in a public turnpike road and a navigable water course to afford analogy for argument from which proper conclusions may be drawn. The turnpike is created by legislation and can be abolished by legislation. But a navigable water course is not created by legislation and cannot be abolished by legislation."

Hutton vs. Webb, 124 N. C., 751, 752.

It is respectfully submitted that there is even less resemblance between a railroad right of way and a non-navigable stream.

It is plain that while there may be an incompatibility in the use of the right of way or tracks of one railroad by another railroad, such as to make such use an inconvenient or even dangerous one, it does not follow that the use of the water in a non-navigable stream for power or other purposes is at all incompatible with a similar use by other riparian proprietors.

The use of passing water for mill and mechanical purposes as a moving power does not destroy or in any considerable degree reduce the volume which still flows on for the use of others.

Walton vs. Mills, 86 N. C., 285.

If, therefore, the rights of the parties be considered as riparian owners only, then this Court will follow the principles of law applicable to riparian owner rather than the principles governing priorities involved in contests over railroad rights of way. To allow the principles applicable

in the latter class of cases to govern and control this case would be subversive of a long course of decisions, and principles firmly embedded in the jurisprudence of the State and in the common law and in the laws of practically every State in the Union.

Considered only as a riparian owner, the appellee has no right of injunction against appellant as another riparian owner. Appellee's sole right as a riparian owner was to develop the power contiguous to its land upon the Hiawassee River in such a manner as not to unreasonably interfere with the rights of other riparian owners upon the land, and as such riparian owner it would not be entitled to an injunction against appellant, another riparian owner.

It is respectfully submitted, therefore, that if the rights of these parties be considered from the view-point of riparian owners only, then under no view of the law could appellee have secured an injunction against appellant.

(f) BECAUSE PLAINTIFF NEITHER IN ITS COMPLAINT NOR DURING THE TRIAL OFFERED TO COMPENSATE DEFENDANT FOR THE PROPERTY AND PROPERTY RIGHTS OF WHICH IT WAS SEEKING TO DEPRIVE IT BY INJUNCTION.

Plaintiff, neither in its complaint nor during the trial, offered to compensate Appellant for the property and property rights which it was seeking to deprive it by injunction.

Neither equity nor law will permit a citizen to be deprived of his property without due compensation. The effect of this injunction is to deprive defendant, both as a public service corporation and as a riparian owner, of its property rights in the Hiawassee River and in the powers of that river, without compensation, or without even an

offer of compensation. It is grossly unjust and illegal to deprive appellant of the use of its property and of its property rights, including the water powers adjacent to its land, through the medium of an injunction or otherwise.

"Riparian rights are not easements or appurtenances, but are inseparably annexed to the soil and are part and parcel of the land itself, and are valuable and vested so that the owner cannot be deprived thereof except by due process of law and upon compensation made."

40 Cyc., 561.

"Private property shall not be taken for public use without just compensation."

Constitution of U. S., 5th Amendment.

"If property consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property, and hence, that his property may be taken in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of the property itself, that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is pro tanto taken and he is entitled to compensation."

1 Lewis Eminent Domain, Sec. 56, p. 58.

It has been adjudged that the due process of law prescribed by the Fourteenth Amendment requires compensation to be made or secured to the owner when private prop-

erty is taken by a State or under its authority for public use.

Norwood vs. Baker, 172 U. S., 279, 43 L. Ed., 447.

C. B. & Q. R. Co. vs. Chicago, 166 U. S., 226, 241; 41 L. Ed., 979, 986.

Long Island, Etc. Co. vs. Brooklyn, 166 U. S., 685, 695; 41 L. Ed., 1165.

Staton vs. Norfolk R. Co., 111 N. C., 278.

Raleigh vs. Gaston R. R. Co., 2 Dev. & Bat-Law (N. C.), 451.

Johnson vs. Rankin, 70 N. C., 550.

Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property being taken for public use without compensation, yet the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina.

Johnston vs. Rankin, 70 N. C., 550.

Cozard vs. Hardwood Co., 139 N. C., 283.

Staton vs. Railroad, 111 N. C., 278.

State vs. Glen, 52 N. C., 321.

Cornelius vs. Glen, 52 N. C., 512.

Private property cannot be taken directly or indirectly, even for a public purpose, without just compensation.

Phillips vs. Telegraph Co., 130 N. C., 513.

Provision that compensation shall be paid by an individual or business corporation, but affording merely a right of action to obtain it, does not satisfy the constitutional requirement.

Atty. Gen. vs. Old Colony R. Co., 160 Mass., 62; 22 L. R. A., 112.

Ash vs. Cummings, 50 N. H., 591.

Steinhart vs. Superior Court, 137 Cal., 575; 59 L. R. A., 404; 92 Am. St. Rep., 183.

Howe vs. Norman, 13 R. I., 488.

Powers vs. Bears, 12 Wis., 213; 78 Am. Dec., 733.

2 Lewis Em. Dom., Secs. 457, 458.

It is not sufficient that the provisions for compensation are such that it will probably be paid.

Conn. River R. Co. vs. Franklin Co., 127 Mass., 50; 34 Am. Rep., 338.

The compensation must either be ascertained and paid to the owner before his property is thus appropriated, or an appropriate remedy must be provided and upon an adequate fund.

State vs. McIver, 88 N. C., 686.

Hutton vs. Webb, 126 N. C., 902.

Bloodgood vs. Mohawk R. Co., 18 Wend., 9; 31 Am. Dec., 313.

Powers vs. Bears, 12 Wis., 213; 78 Am. Dec., 733.

Lewis Em. Dom., Sec. 459.

The intimation of the United States Supreme Court are fully in accord with the decisions that the responsibility of a private person or corporation is not an adequate fund.

Williams vs. Parker, 188 U. S., 491; 47 L. Ed., 559.

Sweet vs. Rachel, 159 U. S., 380, 406; 40 L. Ed., 188, 198.

Manigault vs. Springs, 199 U. S., 486.

An owner is deprived of his property when he is deprived of the right to use and enjoy it.

Edwards vs. Brewton, 184 Mass., 529.

Howe vs. Weymouth, 148 Mass., 605.

Re Wall Street, 17 Barb., 617.

Portland vs. Lee Sam., 7 Ore., 397.

Driver vs. Western, Etc. R. Co., 32 Wis., 569; 14 Am. Rep., 726.

Foster vs. Scott, 136 N. Y., 577; 18 L. R. A., 543.

Whyte vs. Kansas City, 22 Mo. App., 409.

Isele vs. Schwab, 131 Mass., 337.

The right taken is to be paid for without regard to the time when or to the extent to which the taker may see fit to exercise it.

Newton vs. Perry, 163 Mass., 319.

Imbescheid vs. Old Colony R. Co., 191 Mass., 209.

The owner is entitled to reasonable, certain and adequate provisions for obtaining compensation before his occupancy is disturbed.

Cherokee Nation vs. So. Kan. R. Co., 135 U. S., 641, 659; 34 L. Ed., 295, 303.

Whether an interference with property rights is a taking of property within the due process of law clause of the Fourteenth Amendment is a Federal and not a local question.

Chicago, Etc. R. Co. vs. Chicago, 166 U. S., 226, 241; 41 L. Ed., 979, 986.

Missouri, Etc. R. Co. vs. Nebraska, 164 U. S., 403; 41 L. Ed., 489.

Smyth vs. Ames, 169 U. S., 462; 42 L. Ed., 819.

The judgment of a State Court, though authorized by statute, whereby private property is taken for public use without compensation, is wanting due process of law, and the affirmance of such judgment by the highest State Court is a denial of a right secured by the Federal Constitution.

C. B. & Q. R. Co. vs. City of Chicago, 166 U. S., 226;
41 L. Ed., 979.

Ex Parte Ulrich, 42 Fed., 587.

If the right (granted by franchise) is not exclusive there is no ground for injunction.

2 Lewis Em. Dom., Sec. 642, p. 1387.

Charles River Bridge Co. vs. Warren Bridge Co., 6
Pickering, 376; 36 U. S., (11 Pet.) 545; 9 L. Ed.,
823.

Livesey vs. Delp, 9 Baxter, 415.

In the foregoing case of Livesey vs. Delp, the Supreme Court of Tennessee said:

"We do not say that there may not be cases where a Court of Chancery would intervene to protect the rights of a party, for 'an injunction may be granted' says Mr. Story (Eq. Jur. Vol. 2, Perry Ed. Sec. 927) 'in favor of parties possessing a statute privilege or franchise to secure the enjoyment of it from invasion by other parties. The right would have to be clear and exclusive in such cases and in England established if disputed by a verdict before a perpetual injunction would be decreed'."

Livesey vs. Delp, 9 Baxter, 416.

Turnpike vs. Davidson County, 91 Tenn., 295.

Lewis Em. Dom., Sec. 136.

When the grant is not by its term exclusive it cannot be held to be so by implication.

Turnpike vs. Davidson County, 91 Tenn., 294.

Charles River Bridge Co. vs. Warren Bridge Co., 11 Peters, 548.

The principle was settled by this case (Charles River Bridge Co. vs. Warren Bridge Co., 11 Peters, 548) and followed in numerous decisions, that when the grant is not by its terms exclusive, the Legislature is not precluded from granting a similar freedom of erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a taking of the former franchise which entitles its owners to compensation.

1 Lewis Em. Dom., Sec. 136.

Rice vs. Minn. Etc. R. Co., 1 Black, 380; 17 L. Ed., 147.

Washington, Etc. Co. vs. State of Maryland, 3 Wall., 75, 210; 70 U. S., 210; 18 L. Ed., 180.

Moses vs. Sanford, 11 Lea., 731.

Livesey vs. Delp, 9 Baxter, 415.

Turnpike vs. Davidson County, 91 Tenn., 295.

Upon the facts as disclosed by the record in the instant case, if any injunction was issued it should have been issued in favor of appellant enjoining appellee from interfering with the exercise of appellant's plain rights as a riparian owner, and from in any way interfering with the enjoyment of such riparian or other rights of appellant until its property was condemned by due and legal process of law, and compensation made. In the exercise of its plain and adequate legal remedy appellee, if it has the right to condemn either actual or potential water powers belonging

to other corporations chartered for public or quasi public purposes, as was appellant, would have had to make compensation for property or rights in property taken by it. It is submitted that equity will not employ its power of injunction to deprive an owner of his property without requiring compensation to be made, and thus do indirectly what could not be lawfully and constitutionally done directly. In the instant case appellant was and is in fact deprived of the use and enjoyment of its property without compensation, but no bond was required of appellee to indemnify appellant from loss and damage resulting from such taking.

Mr. Lewis, in his work upon Eminent Domain, in Chapter 28, Vol. 2, upon "The remedy for a wrongful interference with property under color of eminent domain and other remedies," says:

"It is now almost universally held that an entry upon private property under color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the constitution and the law. If just compensation has not been paid or deposited as required by law, or if proceedings under which the right to enter is claimed are invalid for any reason, an entry will be enjoined. So if the right is claimed under a statute which is unconstitutional and void, or which does not confer the power of eminent domain, an injunction will be granted to prevent the taking of property which is not within the power granted, or after the power has been exhausted, or after the right has been lost by delay."

2 Lewis Em. Dom., Sec. 631, p. 1354.

And again says Mr. Lewis:

"It seems to us that the jurisdiction of equity in such cases may be placed upon broader grounds, name-

ly: that where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted, or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation. The remedy in equity protects both the owner and those acting under the authority, and is more speedy and efficacious in its operation than the ordinary legal remedies. The Supreme Court of Alabama in discussing the question uses the following language: 'The principle upon which a court of equity proceeds, in interfering to prevent bodies corporate having compulsory power to enter upon, take and appropriate for their own uses the lands of others, differ materially from the principle upon which it intervenes to prevent the commission of continuance of waste, or of nuisances, or of trespasses, when only private rights, or the acts of persons, natural or artificial, not having such powers are involved. In the latter class of cases, if the right be strictly legal and there is no relation of privity between the parties, it is of the essence of the jurisdiction of the court that a case of irreparable injury be shown; a case for which the courts of law do not furnish an adequate remedy. The constitution not only compels all corporate bodies, public and private, or all individuals who may be armed with the power of taking private property, but it compels the State and all its agencies and instrumentalities, to the duty of making just compensation to the owner. * * * It is most essential to the preservation of the rights of private property, to the protection of the citizen, and to the preservation of the best interests of the community, that all who are

invested with the right of eminent domain, with the extraordinary power of depriving persons, natural or artificial, without their consent, of their property and its possession and enjoyment, should be kept in the strict line of the authority with which they are clothed, and compelled to implicit obedience to the mandates of the constitution. A court of equity will intervene to keep them within the line of authority and to compel obedience to the constitution, because of the necessity that they should be kept within control and in subjection to the law, rather than upon the theory that they are trespassers, or that the injury which they are inflicting is irreparable. The owner of the land has a right to say that, unless they keep within the strict limits prescribed by law, they shall not disturb him in the possession and enjoyment of his property. The power is so capable of abuse and those who are invested with it are often so prone to its arbitrary and oppressive exercise, that a court of equity, without inquiring whether there is irreparable injury, or injury not susceptible of adequate redress by legal remedies, will intervene for the protection of the owner."

2 Lewis Em. Dom., Sec. 632, pp. 1356, 1358.

East, Etc. R. Co., vs. East Tenn. R. Co., 75 Ala., 275
280, 281.

In the case of *Otis Co. vs. Ludlow Co.*, in which the upper riparian owner, which actually completed its dam upon a non-navigable stream before the lower riparian owner completed its dam, although said lower owner commenced its dam before the upper owner did, sought an injunction against said lower owner to prevent the upper owner's dam being flooded and rendered useless, the Supreme Court of the United States says:

"A graver doubt is raised by another argument. It is decided that the prior right is gained by the dam first begun, provided it is completed and put in operation within a reasonable time. If, as in the present case, the upper owner builds a dam in the meantime, it may be held that he is entitled to compensation for its being rendered useless, even if he builds without notice of the earlier appropriation, as might well happen. On the other hand, if he refrains from using the land as he desires, he may be denied compensation for being deprived of the use of his land. We do not perceive why the latter result should follow. As to the former, it may be held that, notwithstanding the priority of the lower owner, the upper owner has a right to improve his land **until it actually is flowed**. Otherwise the former might have it in his power to keep the latter in suspense for a year or two and then abandon his dam. Because the plaintiff (upper owner) was too late to prohibit the defendant's (lower owner's) dam it does not follow that it may not be entitled to all the damages which it suffers when the flowing takes place. That it would be entitled to them perhaps may be inferred from *Baird vs. Wells*, 22 Pick., 312, decided under a different statute, but applicable so far as the principle is concerned. See further *Storm vs. Manchaug Co.*, 13 Allen 10, 15; *Edwards vs. Bruorton*, 184 Mass. 529, 532. * * * **The right of the lower owner only becomes complete when the land is flowed.**"

And in said case the bill was dismissed without prejudice, or retained until the plaintiff's rights should have been determined in the proceedings for damages under the statutes.

Otis Co. vs. Ludlow Co., 201 U. S., 155, 156; 50 L. Ed., 706.

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation

and sound discretion, or which is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity that never ought to be extended unless to cases of great injury when the courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear and the injury impending or threatened, so as to be arrested only by the protecting, preventive process of injunction. But that will not be awarded in doubtful cases, or new ones not coming within well established principles, for if its issues erroneously an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, and not of the party who prays for it."

Bonaparte vs. Camden, Etc. R. Co., Baldwin's Rep., 217, 218.

In the instant case it is submitted that upon the facts as disclosed by the record, if any injunction issued, it should have issued in favor of appellant and not appellee. The appellant as a riparian owner had a right to the use and enjoyment of its property independent of its charter. It could not lawfully and constitutionally be deprived of that property or any of its rights in same without compensation being made and paid to it, or the said payment secured. As stated in the case of Walton vs. Mills, 86 N. C., 285: "Since for mill and mechanical purposes the use of the passing water as a moving power does not destroy or in any considerable degree reduce the volume which still flows on for the use of others", and since also the dam sites of appellant and the alleged dam sites of appellee are not located at the same places or locations, and since, as stated by the U. S. Supreme Court in Otis Co. vs. Ludlow Co., *supra*, the right of the lower owner only becomes complete when the land is flowed—that is, when the lower owner builds his dam and overflows the lands or dam of the upper owner, even

when the lower owner had acquired a prior right by beginning to build first, and since, even in such case, the upper owner would be entitled to compensation including compensation for the dam erected by him, it is manifest that the development of its water powers by appellant is "inconsistent" with nothing claimed by appellee, except its pretensions to a monopoly of the water powers upon the Hiawassee River along its whole length in the State of North Carolina and perhaps a part of it in the State of Tennessee.

From the foregoing it necessarily follows that it was a requirement of law and equity that the plaintiff, before it could obtain an injunction against defendant depriving it of its rights in the water powers on the Hiawassee River, should have made compensation, or offered compensation, and in fact paid compensation. The injunction issued in this case was a deprivation of the rights of property of this defendant, without compensation.

THIRD. GRANT OF INJUNCTION IN THIS CASE WAS ERRONEOUS BECAUSE THE COMPLAINANT HAD A FULL AND ADEQUATE REMEDY AT LAW.

The complainant under its charter, if its charter was good, had a right to condemn water power belonging to other corporations or individuals. If it had this power, it had an adequate remedy at law. It could condemn the water power of defendant Company. It could condemn the land of defendant Company. If it had such power of condemnation, it had no right to an injunction. A suit for an injunction is an equitable proceeding and it is elemental and fundamental in equity that equity will not intervene nor grant an injunction when the plaintiff has an adequate remedy at law. This suit was for an injunction and was therefore an equitable proceeding.

Wilson vs. Shaw, 204 U. S., 24, 31.

It follows that this injunction would not be granted when, as in this case, plaintiff had adequate protection at law.

Wilson vs. Shaw, 204 U. S., 24, 31.

Burnett vs. Nicholson, 72 N. C., 335.

Walton vs. Mills, 86 N. C., 282.

McLaughlin vs. Mfg. Co., 103 N. C., 107.

Wilder vs. Strickland, 55 N. C., 386.

Dorsey vs. Allen, 85 N. C., 358.

It of course follows that if complainant Company had no right to condemn the water powers, then it had no right to an injunction in this case to prevent appellant from exercising its legal rights, either as a riparian owner or a public service corporation.

There was no necessity for an injunction in this case, nor to a resort to equity by the complainant, if complainant is entitled to the powers named in its charter and was in possession of a prior location of its works. Under such conditions it had its full and adequate remedy at law by condemning the land or the water power of the defendant. In this situation equity, where there is a complete remedy at law, will refuse relief. It is respectfully suggested that recourse was had to equity, rather than to law, because in a condemnation suit the complainant Company would have had to pay for the land and water power of the defendant which it sought to condemn, and as disclosed by the evidence it had nothing with which to make such payment. It therefore rather sought the aid of equity than its plain remedy at law, because it was not prepared to avail itself of the remedy accorded by law by reason of the burden imposed by the law making payment an essential of condemnation.

It is respectfully submitted that injunction should not have been granted because of the fact that plaintiff had a full and adequate remedy at law.

FOURTH. It is submitted that the Supreme Court of North Carolina erred in holding in its first decision and in reaffirming in its second decision that that water power company is entitled to prior rights to a location upon the river which "first defined and marked its route and adopted the same for its permanent course or location by proper and authoritative corporate action."

We have discussed the principle involved in this statement of the Court in our argument that plaintiff's highest rights were those of a riparian landowner and the attention of the Court is respectfully called to the law cited in that discussion. See pages 69-77 of this brief. That law would seem to clearly show the distinction between railroads' prior rights over a right of way and landowners' respective rights on a water course. In the case of rival railroads priority is gained by prior action and adoption. In the case of riparian landowners their rights are inherent in the nature of their ownership along the stream and exist in spite of any attempted adoption of the powers of the stream by any one of several riparian owners. Each owner has his inherent rights in the stream and cannot be deprived of these rights by an attempted adoption of them by another owner on the stream. A Power Company cannot obtain prior rights which are exclusive simply by adopting them, and if such prior rights can be obtained upon a stream by a power company, such prior rights only apply when they are adopted and developed within a reasonable time.

In this case there was not at the date of the trial any development and there has been no development since the trial, although the plaintiff has been chartered for ten years. If the rule announced by the courts relative to priority as between railroads over a right of way could be applied as between power companies on a stream, that rule would be fatal to this plaintiff, because that rule requires adoption, location and development within a reasonable

time, and in this case location and adoption were by a corporation other than the plaintiff and there has never been any development.

FIFTH. It is respectfully submitted that the Supreme Court of North Carolina erred in holding that plaintiff was entitled to injunctive relief upon the ground that it was not now seeking to condemn any property of defendant in this case.

It is true that plaintiff was not seeking any statutory condemnation of defendant's property. It is equally true that plaintiff was seeking to destroy defendant's rights in this river by injunction which condemned its rights in the river. It was an equitable condemnation far worse for the defendant than a statutory one. The effect upon defendant's rights was final. In a statutory condemnation defendant could have been heard as to values. In this condemnation by injunction its rights and the value of them in this stream were destroyed without compensation.

SIXTH. It is respectfully submitted that the Supreme Court of North Carolina erred in holding that certain deeds to lands made to defendant after the commencement of this action were inadmissible in evidence.

These deeds covered lands along this river necessary for defendant's purposes. They were deeds made in pursuance of contracts entered into by defendant prior to the commencement of the suit. These contracts of purchase were admitted in evidence. The good faith of defendant in its purposes of development was attacked by plaintiff. These deeds following the contracts made prior to the suit illustrated the good faith of defendant and were admissible for that purpose. These deeds further show the situation of the parties at the time of the trial, and this being an equity case, were admissible for that purpose. These deeds were

further offered to show that defendant had complied with its contracts of purchase made in pursuance of its proposed developments and for that reason were admissible in evidence.

It is respectfully submitted that the Court erred in excluding this evidence.

It must be borne in mind that this was a suit for injunction and was therefore an equitable proceeding. The Supreme Court of the United States in the case of *Wilson vs. Shaw*, 204 U. S., 31, says:

"A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff."

This citation is made only to show that this suit was an equitable proceeding. As this suit was an equitable proceeding, the evidence in the shape of these deeds was admissible for the three purposes named. They were admissible, first, to show the standing of the parties at the time of trial, in order that complete equity might be done between them. They were admissible, second, to show the good faith of the defendant Company in its development, which good faith had been attacked in the pleadings and in the evidence of the plaintiff. They were admissible, third, to show that the defendant had complied with all the contracts of purchase which it had made, which contract of purchase had been allowed in evidence, such contracts having been made prior to the institution of this action.

It will be conceded that at law a defendant cannot avail himself of matters of defense which have arisen since the action was commenced, unless such matters are properly introduced by supplemental answers or a plea puis darrein continuance. This rule, however, is different in equitable

cases. Equity is the correction of that wherein the law, by reason of its universality, is deficient.

We find the following in *Corpus Juris*, Volume A to Adult, under the title "Actions," Section 395, page 1150:

"In equity the procedure is more liberal and flexible than at law, and permits the pleading and proving of matters occurring after the commencement of a suit which go to show where the equity of the case lies, and the adaptation of the relief granted to the state of facts existing, not at the commencement, but at the close of the legislation."

Under this rule of law this evidence was clearly admissible for the purposes for which it was offered.

In support of this statement in *Corpus Juris* the author cites the case of *Kelly vs. Galbraith*, 58 N. E., 436, same being a decision by the Supreme Court of Illinois. In this case the Supreme Court of Illinois used the following language:

"It is strenuously insisted, however, by counsel for appellants that while the doctrine thus announced may be correct, so far as the rent due prior and up to the time of filing the bill is concerned, it is yet inapplicable to the present case, so far as it relates to the rent accruing under the lease after the filing of the bill. It is said that the appellee should have filed a supplemental bill in order to entitle herself to the rent accruing after the filing of the bill. In the case at bar appellee did not file a supplemental bill. Undoubtedly the rule in actions at law is that the right of judgment depends upon the facts as they exist at the commencement of the action, but such is not the rule at equity. The relief administered in equity is

such as the nature of the case and facts as they exist at the close of the litigation demand." Citing:

Peel vs. Goodberlett, 109 N. Y., 108; 16 N. E., 350.

Worrell vs. Munn, 38 N. Y., 137.

Sherman vs. Foster, 158 N. Y., 587; 53 N. E., 504.

In another case cited, that of Delaware Trust Company vs. Calm, et al., 88 N. E., 53, Court of Appeals of New York, we find the following:

"(1) While equity may adjust matters as of the date of the trial, an action at law must have fully accrued when it was brought."

In the decision Justice Vann says:

"This is an action at law, and unless the right to maintain it existed when it was brought, it did not exist at all. Courts of equity have plastic hands and can adjust matters as of the date of the trial."

Another case cited is that of Otto Duessel vs. Ludwig Proch, 78 Conn. 343; 3 L. R. A., (N. S.) 854. In this case the Court says:

"In equitable proceedings any events occurring after their institution may be pleaded and proved which go to show where the equity of the case lies at the time of final hearing."

The same law is announced in 16 Cyc., page 479:

"In general, equity adapts its relief to the state of facts existing, not at the beginning, but at the close of the litigation."

Citing Randall vs. Brown, 2 Howard, 406.

Based upon this law, it necessarily follows that defendant had the right to introduce its evidence to show the state existing between the parties, in order that equity might be done at the time of the trial, to show the defendant's good faith and to show that defendant had complied, as evidence of its good faith, with every contract of purchase which it made prior to the commencement of the action, and that the refusal of the admission of this evidence was reversible error.

SEVENTH. It is submitted that the Supreme Court of North Carolina erred in holding that the trial court committed no error in the following portion of its charge to the jury:

"In this connection, it may be well to direct your attention to this proposition of law: In case of a contest between two corporations, which are engaged in a public utility, and are clothed with practically the same power of condemnation, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. To constitute a valid location, the property must be surveyed and marked out, and the survey must be adopted by the company."

We have already argued in this brief that the rule established by the decisions as to priority between railroads adopting the same route does not apply as to water power companies upon a stream. This charge contains this proposition.

The charge further is erroneous in that the principle announced is not qualified by the requirement that development must follow within a reasonable time.

The contention of the defendant was that the plaintiff had not within a reasonable time started its development

and had abandoned any development contemplated. The law is that a public utility corporation which first adopts a location must within a reasonable time proceed to develop that location. This is the test laid down by all the law writers and it is especially the test announced in the case of *Blue Ridge, Etc. Co. vs. Henderson, Etc. Co.*, 171 N. C., 314. This principle of law, as announced by this Court in the Henderson case just cited is laid down as the general law in *Cyc.*, Volume 23, page 396, at which place that authority says:

"In determining the time when the right to water by appropriation begins, the law does not restrict the appropriator to the date of his use of the water, but applying the doctrine of relation fixes it as of the time when he begins his dam, ditch, flume, or other appliance by means of which the appropriation is affected, provided the enterprise is prosecuted with reasonable diligence. If, however, the work for the actual appropriation of the water is not prosecuted with reasonable diligence, the time of appropriation will not relate back to the beginning of the work."

The test decreed by this Court and by other eminent legal authority is that the priority obtained by location must be followed up with reasonable diligence, and the Court in its charge erred in not incorporating that legal principle in connection with the portion of the charge complained of.

EIGHTH. It is submitted that the Supreme Court of North Carolina erred in holding that the following portion of the charge of the trial court to the jury was not erroneous:

"There is another principle; where a priority of right has been secured by priority of location, such prior right cannot be defeated by a rival company agreeing with the owners and purchasing the property;

nor can it be defeated by condemnation; that is to say, if one rival company surveys, defines, marks and adopts the location of property which it proposes to acquire for purposes of public utility, another company cannot occupy the same territory, and defeat the claims of the first by condemnation or by purchase."

The same criticism applies to this charge as to the one just discussed. First, the principle announced should not apply between water power companies. Second, the Court did not add the necessary requirement that developments should start within a reasonable time in order to establish such prior right.

NINTH. It is respectfully submitted that the Supreme Court of North Carolina erred in holding that the trial court did not commit error in the following portion of its charge to the jury:

"Now, gentlemen of the jury, what is meant by the word 'abandonment,' as used in this issue? Did the plaintiff abandon its location and proposed plans? To abandon a right or to abandon property means to relinquish it, to give it up permanently, to leave it. The abandonment of a right to property includes both the intention to abandon and an external act by which such intention is carried into effect. There must be a concurrence of intention to abandon a right to property with actual relinquishment of it or giving it up. It is a well settled principle that to constitute an abandonment or renunciation of a claim to property, there must be acts and conduct positive, unequivocal and inconsistent with the claim of title; mere lapse of time, mere delay in asserting a claim or mere period of time during which no work was done, would not be sufficient in itself to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right."

The definition of abandonment given was not the proper definition of abandonment in a case of this kind. The definition of abandonment given related rather to the abandonment of some piece of personal property or a piece of real property, but it did not relate to the class of abandonment insisted upon in this case, to wit: the abandonment of a project to develop water power. Abandonment of a water power right is measured either by proof of intent to give up and some external act showing the giving up of the project, or in a legal way by the failure of the developer to proceed with reasonable diligence to develop it. If this were not true, then a project to develop water power could never be said to be abandoned. There could never be any proof of the intention in the mind of the projector to abandon and the projector would never give any external evidence of abandonment. He could not do so. His developing project related to a river and to the flow of a river and there could be no external act by which he could show an abandonment, so that the only true measure of abandonment in a case of this character is the diligence or lack of diligence of the projector of a plan to develop the plan.

The Court in its charge stated that in a case of this character, "mere lapse of time, mere delay in asserting a claim, or a mere period of time during which no work was done, would not be sufficient in itself to constitute abandonment, unaccompanied by any acts clearly inconsistent with the right."

If this be the law relative to the development of a water power, then there can never be proof of any abandonment of a project to develop a water power. If this be the law, then the plaintiff could go to every river in North Carolina and locate a dam site and have the land surveyed and file a map, and then during all time have priority of right on each one of the rivers, and that priority of right could never be defeated on the plea of abandonment because it could never

be shown what was the intent in the minds of this Company relative to this project, and there could be no external evidence of the abandonment of the water power in the river.

No development was ever done by this Company on the Hiawasse River and there was therefore no partly developed plan to abandon. The true test of abandonment of an enterprise of this character is found in the failure of the projector to develop. At the time of this trial this project had been in the minds of its developers for nine years and there had been no development. The plaintiff was unquestionably insolvent at the time of the trial and unquestionably insolvent in 1913, when it was in the hands of a receiver. It never had an unquestioned water power—that is, it never owned both banks of the stream at either one of its proposed dam sites. It never had located a dam. It had bought some property, but it had taken options on a great deal more property which it had allowed to lapse. It had brought condemnation suits which it had never caused to come to trial. Surely all these acts proved true abandonment in a case of this character and the question of abandonment is not dependent upon the intent in the mind or the necessity of external evidence of an abandonment of a flowing river. This charge of the Court did not even inform the jury that non-user was evidence of an intention to abandon, though it is recognized that non-user is practically the only evidence that can be had of the intent of the parties and it is well recognized that non-user is evidence of intention to abandon.

Am. & Eng. Ency. of Law, Vol. 30, p. 398.

It is respectfully submitted that the learned Judge, in applying the law as to the abandonment of property to the abandonment of a water power in a river applied the wrong test, and that the charge was further error in that he did not inform the jury in connection with the charge as to

what evidence could be considered as an intent to abandon, and did not specifically charge in connection therewith the element of non-user as evidence of such abandonment, the defendant having strenuously contended that an abandonment was shown by the failure of the plaintiff to use for a period of nine years.

TENTH. It is respectfully submitted that the Supreme Court of North Carolina erred in holding that the following portion of the charge of the trial court to the jury was not erroneous:

"If you find from the evidence that the maps in question were carried to the office of the Clerk of the Superior Court of this County by E. B. Novell, attorney for the plaintiff, and George E. Smith, Vice-President of the plaintiff Company, or either of them for and on behalf of the plaintiff during office hours, on or about June 21st, 1911, and were there delivered to the Clerk, and the Clerk was then and there informed that the maps were placed in his custody under the terms of the plaintiff's charter, that this was necessary in order to enable the plaintiff to condemn land under the charter, and the Clerk received the maps in his official custody to be kept on file in the office, and that Norvell and Smith, or either of them, in good faith, left the papers there to be kept on file as a record of the office, you will then answer the fourth issue 'Yes;' although you may further find from the evidence that the word 'filed' was not, in fact, endorsed upon the maps by the Clerk. Unless you answer this issue 'Yes' under the instructions, you will answer it 'No.'"

In the charge complained of the Court instructed the jury that if the maps were carried to the Clerk's office by officers of the plaintiff Company and were delivered to the Clerk and the Clerk was told that the maps were placed in

his custody under the terms of plaintiff's charter and that this was necessary in order to enable plaintiff to condemn land under the charter, that this would constitute filing.

It is respectfully submitted that this will not constitute filing and that the Court erred in this portion of its charge. To file a paper means to place it with the Clerk on file.

These maps were, according to the evidence, never carried to the Clerk to be filed. They were carried there to be deposited under the terms of the charter, and the Court in its charge should have instructed the jury that before the maps could be considered as filed, in so far as the public was concerned, they must be left with the Clerk for filing; that they must be filed by the Clerk; that the record of the filing must be shown upon the maps and the record of the filing must be shown upon the public records of the County.

The Court should further have instructed the jury that the charter of this Company, in requiring these maps to be filed, had no other purpose than the sole object of giving the public notice of the plaintiff's proposed developments, and that that notice could not be given unless the maps were legally filed, were so marked and were recorded as filed in a document or book in the Clerk's office, to which the public would have access and by reason of which the public would receive notice of such filing. The original idea of filing a paper was to string it on a wire—that is, to make it a part of the records in the office,—and it is respectfully submitted that the test made in this portion of the charge of the Court does not comply with the test required by the law as to filing a paper. The test required by law cannot be complied with until there is such actual filing as will give the public notice of the existence of the paper filed.

ELEVENTH. In conclusion it is respectfully submitted that under the law and the evidence in this case the Su-

preme Court of North Carolina erred in affirming the verdict and judgment of the lower court and in refusing this appellant a new trial. The matters of law which should have prevented this affirmance have been discussed in this brief. We have not felt that in this Court it would be proper to discuss the evidence at length. It has been referred to only when necessary in connection with a legal contention.

A consideration of the present assignment of error compels a brief consideration of the issues and some of the evidence applicable to them.

The issues are found on page 48 of the record.

The first, second, third, fourth and fifth issues related to the claims of the plaintiff. The verdict answering these issues found, first, that the locations for the dams, reservoirs and public works claimed by the plaintiff were surveyed and staked out on the Hiawassee River in the year 1909. This issue was found in the affirmative by consent of counsel. This consent did not relate to any locations of dams, reservoirs and public works by the plaintiff and the consent was based entirely upon the evidence that Verdell in 1909 had made the maps known as Exhibits 7 and 7-A and had done the work on the river as testified to by him in his evidence. The affirmative answer to this issue did not determine who or what company made the locations of the dams, reservoirs and public works claimed by the plaintiff, but was answered by consent in the affirmative only because it was undisputed that Verdell had done the work in 1909 on the river which he testified he had done.

The second issue determined in the affirmative that the plaintiff, before the organization of defendant Company in 1914, adopted the locations fixed by Verdell in 1909 by authoritative corporate action.

The third issue determined that the plaintiff had not abandoned its locations and proposed plans prior to August 21st, 1914.

The fourth issue determined that the plaintiff had filed on or about June 21st, 1911, plaintiff's Exhibits 7 and 7-A, these exhibits being maps of its upper and lower reservoirs.

The fifth issue determined that the plaintiff, on or about the 17th day of August, 1914, by authoritative corporate action adopted the surveys and locations.

It is respectfully submitted that the verdict on all these issues, except the first issue, was contrary to the evidence and without evidence to support it and resulted in particular from the errors complained of in defendant's exceptions to the different portions of the charge of the Court. An argument upon this contention would necessitate the repetition of the argument already contained in this brief upon each of the points covered by the preceding exceptions of the defendant, and is therefore unnecessary. It is respectfully submitted that in view of the contentions of the defendant heretofore made in this brief under the different exceptions, it clearly appears that the verdict was contrary to the evidence and to the weight of the evidence and without evidence to support it, and was based upon certain errors in the charge of the Court and was due to the admission of certain incompetent and irrelevant evidence and was due to the exclusion of certain material evidence. All of these points are covered in the argument already made relative to the different exceptions covering the points involved, and the Court will not be burdened with a repetition of it.

Appellant strongly urges that the Court erred in failing to set aside the verdict and in granting a judgment in the cause, and that in order that the full right and equity may be done the verdict and judgment should be set aside and a

new trial granted appellant, with direction that a non-suit be awarded, or other proper direction given.

It is further submitted that the verdict and the judgment based thereon founded upon the answer of the jury to the seventh issue was erroneous and should be set aside.

The sixth issue related to the location of the dams, reservoirs and public works claimed by the defendant and by consent that issue was answered in the affirmative by the jury and that affirmative answer to the sixth issue determined that the locations for the dams, reservoirs and public works claimed by the defendant on the Hiawassee River were surveyed and staked out. This issue determined the defendant's right to its locations upon the river. The negative answer of the jury to the seventh issue determined that the defendant had not by authoritative corporate action adopted the locations which it had surveyed and staked out on the river. It is respectfully submitted that this negative answer to this seventh issue was contrary to the evidence, contrary to the weight of the evidence and without evidence to support it, and that the Court erred in granting a judgment against defendant based upon the negative answer of the jury to this seventh issue. A consideration of the evidence will disclose:

(1) That Van Deventer in 1913 and in 1914, up to July 16th, 1914, had been acting as the developer of the defendant Company.

(2) That during this period he had had the river surveyed by McClelland.

(3) That he had initially had options taken by McMullen on land on the river necessary for his purposes.

(4) That he had had Chapman, through Mullens, his employee, investigate, survey and report upon the water

powers of the Hiawassee River and that this report had fixed two water powers, one at Shoal Creek and one at Coleman dam site, on the river.

(5) That Van Deventer had had the water power upon the river investigated by Charles O. Lenz, an electrical and hydraulic engineer.

(6) That Lenz had fully investigated the water power upon the river with reference to two dams, one at Shoal Creek and one at Coleman dam site, and had made a full report to Van Deventer covering the water power at these two dam sites upon the river and the kind of dam which should be built at each dam site, the kind of power house which should be erected, and the kind of machinery which should be used, and the markets for electrical current in the surrounding territory and the cost of a transmission line necessary, the cost of a railroad from Turtletown to the Coleman dam site, the estimated expense of operating the plants and estimated income from the plants and the full cost and expense of installing complete developments at both points; all such investigations and reports being based upon developments at Shoal Creek and Coleman dam sites.

(7) That contract had been made by defendant with the Sullivan Machinery Company to bore the dam sites at Shoal Creek and Coleman and that core drilling had actually started upon the dam sites prior to the filing of this suit; that McClelland, Mullens and Lenz had made maps and surveys of the river, had cross-sectioned the river at the dam sites, had run the base lines, had staked the contour lines, and had furnished the result of their work in the form of maps, reports, plans and surveys showing the development at Shoal Creek and Coleman dam sites.

(8) That Van Deventer, prior to the incorporation of the Company, had bought up a large part of the land neces-

sary for the development of the two dam sites of the defendant, had taken some deeds and had regular contracts of purchase covering the other lands contracted for; that every obligation under every contract of sale thus made by Van Deventer for the Company, or by the Company itself had been complied with and the money due thereunder paid; that at the first meeting of the stockholders of defendant Company in July, 1914, Van Deventer had transferred all the land which he held under deeds or under contracts to the defendant Company and had transferred and delivered to defendant Company all maps, surveys, reports, and plans covering the two dam sites at Coleman and Shoal Creek, and that the deed from Van Deventer to the Company and the maps, surveys, plans and reports had all been received and accepted by the Company and the stock of the Company issued to Van Deventer for these deeds, maps, surveys, plans and reports; that this payment to Van Deventer for these properties in the stock of the Company was made in order that the Company might acquire "lands situated on the Hiawassee River in Cherokee County which are necessary for the purposes of the Company and to which he (Van Deventer) had theretofore acquired title and all his (Van Deventer's) right, title and interest in and to certain other lands so situated and so necessary for the purposes of said Company which he (Van Deventer) had theretofore acquired by virtue of certain written contracts and of maps, surveys, engineers' reports, etc., which he (Van Deventer) had prepared." (See Defendant's Exhibit No. 32. meeting of subscribers to articles of incorporation of appellant Company, page 255 of record.

At the first meeting of the subscribers to the articles of incorporation of appellant Company, "It was voted unanimously by all the subscribers, except Hugh F. Van Deventer, to accept said lands, maps, surveys, engineers' reports, etc., in payment for nine hundred and eighty shares of the capital stock of the corporation, and it was voted as the

honest judgment of said subscribers that these were well and fairly worth the sum of ninety-eight thousand dollars."

Again, in a Directors' meeting of appellant Company held on July 15th, 1914, the following action had:

"It being stated that it was deemed expedient to take prompt steps to acquire so much of land or lands of Alvin S. Farrow or Dick Fowler as are necessary for the purposes of a dam which the Company proposes to construct at the Nelson-Hamby site on Hiawassee River by condemnation, all efforts to acquire the same by purchase having failed, and same being required for this purpose, the president was instructed to begin such proceedings at once."

This resolution related to the dam at Coleman.

It will be borne in mind that all of these actions related to the work of Van Deventer upon the river and it must be said that the action of the Company in accepting the charter providing for the development upon the Hiawassee River, near Murphy in North Carolina, and the acceptance by the Company of all the work and plans that Van Deventer had theretofore done upon the proposition, and the acceptance by the Company of the deeds, maps, plans, surveys, reports and contract of sale which had been prepared, locating the dams at Shoal Creek and Coleman dam sites, and the action of the Company in instructing the condemnation of the land of Dick Fowler relative to Coleman dam site, and the action of the Company in making the contract with the Sullivan Machinery Company to drill the dam sites named, and the actual work done by the Company upon the dam sites named through the Sullivan Machinery Company, was all an acceptance and adoption by the Company of the surveying and staking out and location of the two dam sites by Van Deventer and his agents prior to the incorporation of the Company.

This being true, it necessarily follows that the negative answer of the jury to the seventh issue submitted was erroneous, without evidence to support it and contrary to all the evidence. This negative answer of the jury to this seventh issue was in reality a non sequitur to the affirmative answer of the jury to the sixth issue, and it is respectfully submitted that being without evidence to support it and being contrary to the evidence, the verdict of the jury on this seventh issue was contrary to law and the judgment of the Court based upon this erroneous answer of the jury to this seventh issue was contrary to the law and should be set aside.

By reason of this erroneous answer to the seventh issue a judgment of injunction was granted against defendant and defendant was denied the affirmative relief sought against the plaintiff in this case. It is respectfully submitted that under all the evidence plaintiff was not entitled to injunction against the defendant and the defendant was entitled to affirmative relief against the plaintiff.

A consideration of the time involved in this matter by the two respective Companies will illustrate the rights of each to the relief sought by each in this case.

The appellee Company contended that from 1909 it had sought to develop upon the river. As a matter of fact, the proposition to develop upon the river which it claimed had been projected since 1906. During all that time it had made no development. It had been in the hands of a receiver and had been insolvent and was insolvent at the time of the trial. It had abandoned its project and had remained inactive in every detail until the appellant Company was organized in July, 1914. As soon as appellant Company was organized it became active through Powellson, sought to buy land which was necessary for appellant Company's development, and finally filed this suit for injunction to pre-

vent defendant Company from developing and to hinder and delay defendant and interfere with the defendant in its development. This appellee Company had never done anything except interfere with everybody else who sought to develop the water power upon this river. It had been a stock-jobbing proposition from its inception. Its first step was to organize three different companies, all owned by the same people and all projected for the purpose of issuing securities which would be delivered by the one company to the other and then foisted upon the public. The plaintiff had never since 1906 in good faith developed or undertaken to develop the water power upon the Hiawassee River. Its whole history is a series of transactions in which it has sought to bottle up the power upon this river and prevent its development by other parties.

On the other hand, the defendant Company has from its inception, by Van Deventer, proceeded in a direct line toward development. Within a year's time Van Deventer had bought all the land he could obtain that was necessary for his purposes. He had paid every dollar he had contracted to pay for this land. He had brought condemnation suits for land he could not buy. He had had the river surveyed and his dam sites located. He had had full reports made by distinguished engineers as to the water power obtainable and as to the expense of installation and the cost of operation and the profits obtainable. He had had the dam sites core drilled in order to determine the foundation necessary for the dams. He had obtained land necessary for his dam sites upon both sides of the river at his dam sites. He had made arrangements with Hardaway & Company for the erection of a dam. Everything that he had done had been adopted by the Company. They were proceeding to build a dam to develop it. While they thus proceeded the plaintiff Company, within a month after the organization of the defendant Company, brought this suit. At the time they brought this suit the plaintiff Company did not own a dam

site upon the river. They proposed to erect a dam near Appalachia and they never owned a river bank on one side of the stream and only a few acres on the other side of the stream and did not own the land adjoining these few acres for a mile up the stream. They proposed to erect another dam at Beaver Dam Creek and did not own the land on both sides of the stream so they could not erect a dam there. Prior to the institution of this suit they never had good title to a dam site upon the river, although for eight years their project had been before them. The defendant Company had done more in the one month of its existence than the plaintiff Company had done from 1906 to 1916.

The defendant Company had no notice of any proposed development by the plaintiff Company. The maps required were not filed. The deeds on record simply denominated the plaintiff Company as riparian owner, because, while the deeds referred to dam sites and contour lines, no dam sites had ever been fixed by the plaintiff. So far as this water power proposition is concerned, the defendant Company came into the field without notice and as innocent purchaser. Even the constructive notice fixed by the law was lacking. Upon the petition filed by its attorney and director and agent, the basis of this receivership suit being that the Company was insolvent, a receiver had been appointed for appellee Company. It was insolvent then. The records show that not a dollar has been raised for it since, and that it was insolvent at the time of the trial. Every dollar that Powellson and his associates have put into the Company has been loaned to the Company and has become a liability of the Company.

In this situation Van Deventer and his associates entered the field and were almost immediately stopped by this injunction suit. A consideration of the record will disclose that this suit was nothing but a further step in the plan of plaintiff Company to prevent the development of the water

power upon the Hiawasse River. It was not a step conceived in good faith by the plaintiff to enable it to develop it. This Court must determine whether under the law of North Carolina the plaintiff Company can indefinitely and forever prevent the development of the water power upon this magnificent river. If it ultimately prevails in this suit, then the horse power in that river will indefinitely flow unharnessed to the sea. If defendant Company ultimately prevails in this suit, then those horses will be harnessed and will be made to work for the upbuilding of this State and the promotions of industries in this section.

Respectfully submitted,

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Of Counsel for Appellant.

APPENDIX

REVISAL OF NORTH CAROLINA OF 1905.

Section 1571:

Any duly incorporated company possessing the power to construct telephone or telegraph lines, lines for the conveying of electric power or for lights, either or all, shall have the right to construct, maintain and operate such lines along any railroad or other public highway, but such lines shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

Section 1572:

Such telegraph, telephone or electric power or lighting company shall have power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which its lines are proposed to be erected, for the right of way for planting, repairing and preservation of its poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation: Provided, that this section shall not be construed as requiring electric or lighting companies to erect offices for public accommodation.

Section 1573:

May exercise right of eminent domain.

Such telegraph, telephone, electric power or lighting company shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles and to establish offices, upon making just compensation therefor.

Section 1573:

Proceedings to condemn lands.

Whenever such telegraph, telephone, electric power or lighting company shall fail on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it shall be lawful for such company, first giving security for costs, to file its petition before the Superior Court for the county in which such lands are situate, or into or through which such easements, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, privilege or easement, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction of the person or corporation owning the easement or right of way, be made a party defendant: Provided, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right of way of a railroad or railway company sought to be condemned extends into or through more counties than one, the whole right and controversy may be determined in one county into or through which such right of way extends: Provided further, that it shall not be necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its board of directors.

Section 2575:

Eminent domain. What companies may exercise.

Every railroad, street railway, plank road, tram-road, turnpike, and canal company, for the purpose of construct-

ing their road or canal, may at any time enter upon the lands through which they may desire to conduct their road or canal, and lay out the same as they may desire; and they may also enter on such contiguous land along the route as may be necessary for depots, warehouses, engine sheds, workshops, water stations, toll houses and other buildings necessary for the accommodation of their officers, servants and agents, horses, mules and other cattle, and for the protection of their property; and shall pay to the proprietors of the land so entered on such sum as may be agreed on between them. Telegraph, telephone, electric power or lighting, public water supply and incorporated bridge companies may exercise the right of eminent domain under the provisions of this subchapter.

Section 2578:

No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling house, yard, kitchen, garden or burial ground.

Section 980:

No conveyance of land, or contrary to convey, or lease of land for more than three years, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lieth.

Section 460—Lis Pendens:

Notice of—Filed in County where land lies.

In an action affecting the title to real property, the plaintiff at the time of filing the complaint or at any time afterwards, or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief at the time of

filing his answer or at any time afterwards, if the same be intended to affect real estate, may file with the Clerk of each County in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be the foreclosure of a mortgage, such notice must be filed twenty days before judgment and must contain the date of the mortgage, the parties thereto, and the time and place of registering the same.

Section 461:

The notice of lis pendens shall be of no avail unless it shall be followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after such filing.

Section 462:

Effect of on subsequent purchasers.

From the filing of the notice of lis pendens only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered shall be deemed a subsequent purchaser or incumbrancer and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were made a party to the action. For the purposes of this section an action shall be deemed to be pending from the time of filing such notice.

N. C. ACT OF 1907—Chapter 74.

Section 1:

That after the word offices at end of line four of section 1573 of the Revisal of 1905, the following be inserted: "and to take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, works, or power houses, and the right of way through all lands between their reservoirs, ponds, dams, works and power houses, with the right to divert the water from such ponds or reservoirs and conduct same by flume, ditch, conduit, waterway, or pipe line, or in any other manner, to the point of use for the generation of power, at such said power houses, returning said water to its proper channel after being so used: Provided, that the power given under this act shall not be used to interfere with any mill or power plant actually in process of construction or in operation; and provided further, that water powers, developed or undeveloped, with necessary land adjacent thereto for their development, shall not be taken; and that this act shall not authorize the taking of residence property, or vacant lots adjacent thereto, in town or cities, or other residence, gardens, orchards, graveyards and cemeteries: Provided further, that this act shall not apply to any suit now pending in any of the Courts within this State.

Section 2:

That this act shall be in force and effect after its ratification; and provided further, that any provisions in any special charter heretofore granted in respect to the exercise of the right of eminent domain, which are in conflict with the general law as herein amended, are hereby repealed.

In the General Assembly read three times, and ratified this the 31st day of January, 1907.

Constitution—Art. VIII, Sec. 1:

Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the legislature, the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

Article I, Sec. 37:

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.

JAN 27 1920

JAMES D. MAHER,
CLERK.

IN THE
Supreme Court of the United States

—
No. ~~660~~ 208

—
OCTOBER TERM, 1919.

—
HIAWASSEE RIVER POWER CO.
Appellant.

vs.

CAROLINA TENNESSEE POWER CO.
Appellee.

—
REPLY BRIEF OF APPELLANT.

—
SANDERS McDANIEL,
E. R. BLACK,
Attorneys for Appellant.

E. R. BLACK,
of Counsel.

IN THE

Supreme Court of the United States

Writ of Habeas Corpus

Return to Writ of Habeas Corpus

Return to Writ of Habeas Corpus

Return to Writ of Habeas Corpus

Return to Writ of Habeas Corpus

Return to Writ of Habeas Corpus

Return to Writ of Habeas Corpus

IN THE
Supreme Court of the United States

No. ~~669~~ 208

OCTOBER TERM, 1918.

HIAWASSEE RIVER POWER CO.

Appellant.

vs.

CAROLINA TENNESSEE POWER CO.

Appellee.

REPLY BRIEF OF APPELLANT.

We desire to file this reply brief to the contention made in the brief of attorneys for appellee that there is no Federal question involved in this case and that this Honorable Court therefore has no jurisdiction to consider this appeal. The argument in the brief of counsel for appellee covering this question is contained in pages nine to thirty (both inclusive) of their brief.

On page nine the statement is made that an examination of the record will show that no Federal ques-

tion is in any way or manner involved. The further statements are made that no Federal question is pleaded, that no Federal question was considered or thought of in the trial court in the instructions to the jury, that the assignment of errors on the appeal from the Superior Court of Cherokee County to the Supreme Court of North Carolina will show that no Federal question was thought of, suggested or raised in any manner, and that the opinion of the Supreme Court of North Carolina will show that no Federal question was argued before that Court or considered or decided by that Court, and that no Federal question was in any way "suggested, raised or considered, either in the Trial Court or in the Supreme Court of North Carolina."

Again, on page fourteen of their brief counsel for appellees assert that "an examination of the record in this case will show beyond all question that absolutely no Federal question was at any time suggested, set up, claimed, argued or considered until the same was attempted to be set up by the petition for writ of error on the 17th day of August, 1918, nearly three months after the decision of the case in the Supreme Court of North Carolina."

Again on page fifteen of their brief counsel for appellees assert that they find that "an attempt has been made in the assignments of error to this Court to raise Federal questions. No Federal question was raised or considered either in the Trial Court or in the Supreme Court of North Carolina. The assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina are set out in full on pages 194 to 204, and if any Federal question had been involved in the

case it should have and must have been set up at least in those assignments of error."

On page twenty-nine of their brief counsel for appellees again assert that "no attempt was made either in the Trial Court or in the State Supreme Court to raise a Federal question."

It is difficult for us to understand these statements of counsel for appellee or to reconcile them with the history and record of this case. These counsel have been in this case from its inception and must be familiar with the record.

The first Federal question presented relates to the charter of appellee company. On an appeal to the Supreme Court of North Carolina all proceedings are set out in a "Statement of the Case on Appeal." This "Statement" is the record on appeal.

An inspection of the record on page 52 will disclose that the Federal question presented relative to appellee's charter was raised in the Trial Court when the charter was offered in evidence by appellee. On this page of the record is found the following language:

"Upon the trial plaintiff (appellee in this Court) offered the following evidence, to wit: Charter of the Carolina Tennessee Power Company; Act of the Legislature incorporating the Carolina Tennessee Power Company, ratified Feb. 16, 1909, being Chapter 76 of the private laws of 1909, marked plaintiff's exhibit No. 1. Copy attached.

"To the introduction of this charter the defendant objected on the ground that same was in terms and effect a monopoly and a void exercise of power by the State Legislature which under-

took to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the *Fourteenth Amendment*."

In this way, by objecting to the introduction of this charter as evidence, the Federal question as to the charter was first presented to the Trial Court and raised in that Court.

After the verdict of the jury in the Trial Court appellant moved for a new trial. One of the grounds of this motion was alleged error in the admission of evidence by the Trial Court. (See judgment of Trial Court overruling motion for new trial on page 50 of record). This motion again involved the Federal question made against the admission of this charter of appellee in evidence. The denial of its motion for new trial upon the grounds stated is set out in the "Statement of case on Appeal" (page 193 of the record). To this denial exception was taken by appellant.

The first "assignment of errors" from the Trial Court to the Supreme Court of North Carolina related to the error of the Trial Court "in admitting in evidence, *over the defendant's objection*, the charter of the Carolina Tennessee Power Company (appellee). (Page 194 of the record.) It is submitted that the Federal question as to appellee's charter was properly made in this assignment of error. Error was alleged that it was admitted "*over the defendant's objection*," that objection, as shown in the "Statement of the case on appeal," being based upon the assertion that this charter was opposed to the Fourteenth Amendment.

In the printed briefs filed by appellant in the Supreme Court of North Carolina every contention and

every Federal question relative to this charter presented in the briefs in this Court were presented. We realize that this Court may not refer to the briefs filed in the Supreme Court of North Carolina to ascertain whether a Federal question was presented in that Court. We will, however, file with the Clerk of this Court a copy of that brief and would be glad if this Court might refer to it in verification of our statement that in that brief the same questions were presented and argued relative to appellee's charter as are here presented.

In the opinion of the Supreme Court of North Carolina in this case it will be seen that our contentions relative to that charter, embracing the Federal questions here presented, were considered and that that Court decided against them.

In that opinion, on page 276 of the record, the Court says:

"The defendant has assailed the charter of the plaintiff, as being *unconstitutional and invalid*."

Following this statement the Court in its opinion (pages 276, 277, 278 and 279 of the record) discusses the points made against plaintiff's charter and decides them adversely to appellant's contentions. On page 278 of the record the Court in its opinion discusses the effect of the Fourteenth Amendment upon the charter of appellee, and concludes on page 279 with the statement:

"There is therefore no wrong done to the defendant, and no violation of its constitutional rights. The legislation is neither *partial nor discriminatory*."

It will thus be seen that the Federal questions presented in this Court relative to the unconstitutionality of appellee's charter were made in the Trial Court and in the Supreme Court of North Carolina, and were decided by the latter Court.

This Court, in considering the question as to whether a Federal question was presented in the Court below, will consider the question presented in the "Statement of case on appeal" from the Trial Court to the Supreme Court, the same question presented in the "Assignments of Error" from the Trial Court to the Supreme Court, and the opinion of the Supreme Court of North Carolina, as parts of the record in those Courts and in this Court on appeal.

In presenting the Federal question relative to appellee's charter, appellant followed the rules of practice of the Supreme Court of North Carolina. This rule is stated on page 17 of appellee's brief. As required by this rule "Statement of case on appeal" was made reserving the exception relative to appellee's charter, and the same exception was set forth as appellant's exception number one in the assignment of errors to the Supreme Court of North Carolina. In this way this question was made a part of the record both in the Trial Court and in the Supreme Court of North Carolina, and is rightly presented as a part of the record on the appeal in this Court.

That the Federal question relative to appellee's charter was made clearly appears from the opinion of the Supreme Court of North Carolina, and by rule of the Court the opinion of the State Court is now a part of the record and will be considered by this Court "for the purpose of ascertaining whether either party claimed, in proper form, that a State law, upon which

some of the issues depended, was in contravention of the Constitution of the United States."

Loeb vs. Columbia Township Trustees, 179 U. S., 472, 483.

Sayward vs. Denny, 158 U. S., 180, 181.

United States vs. Taylor, 147 U. S., 695, 700.

We recognize that this Court will not entertain jurisdiction of a case unless a Federal question is involved, is properly presented, and a decision upon it was necessary to the judgment rendered.

We respectfully submit that this case contains all of these elements. A Federal question relative to appellee's charter is involved, it was and is properly presented, a decision was made upon it, that decision was adverse to appellant, and was necessary to the judgment rendered.

The attack upon appellee's charter went to the vitals of appellee's rights. If appellee had no valid charter it had no rights. The judgment sustaining its charter decided the Federal question made and was decisive of appellee's rights in the present action.

This Federal question was raised in the Trial Court and in the Supreme Court and decided by the Supreme Court. This being true, it is immaterial how it was raised, and under the decisions of this Court, having been raised and decided by the State Supreme Court, it comes within the jurisdiction of this Honorable Court and will be reviewed by it.

"If the Supreme Court of the State treated Federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result it did reach, it becomes immaterial to consider how they were raised."

Miedrich vs. Lauenstein, 232 U. S., 236, 243.
North Carolina R. R. Co., vs. Zachary, 232 U. S.,
248, 257.
Mallinckrodt Works vs. St. Louis, 238 U. S.,
41, 49.
Cissna vs. Tennessee, 246 U. S., 289, 294.

By reason of the facts as to this Federal question as disclosed by the record, it is respectfully submitted that under the law this case is reviewable by this Honorable Court and should not be dismissed.

Respectfully submitted,

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E. R. BLACK,

Attorneys for Appellant.

E. R. BLACK,
of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 208

HIAWASSEE RIVER POWER COMPANY,

PLAINTIFF IN ERROR,

V.

CAROLINA-TENNESSEE POWER COMPANY,

DEFENDANT IN ERROR.

BRIEF OF

MARTIN, ROLLINS & WRIGHT,

Counsel for Defendant in Error.

STATEMENT OF FACTS

1. PARTIES ON THE RECORD.

Attention is called to the fact that in the brief for Plaintiff in Error, and, in fact, throughout the brief, the Carolina-Tennessee Power Company, Defendant in Error, is referred to as "plaintiff" and the Hiawassee River Power Company, Plaintiff in Error, is referred to as "defendant." No doubt this was an oversight on the part of counsel.

2. HISTORY OF THE LITIGATION.

The writ of error in this case was sued out by the plaintiff in error, Hiawassee River Power Company, against the defendant in error, Carolina-Tennessee Power Company, to reverse a judgment of the Supreme Court of the State of North Carolina, in favor of the Carolina-Tennessee Power Company, Defendant in Error.

(Record page 1). The judgment sought to be reversed was rendered by the Supreme Court of North Carolina at the Spring Term, 1918, and the opinion was filed by Walker, Justice, May 28, 1918, (record page 270, original page 417; also record page 285). On the 21st day of August, 1914, the Defendant in Error, Carolina-Tennessee Power Company, brought a civil action in the Superior Court of Cherokee County, North Carolina, against the Plaintiff in Error, Hiawassee River Power Company, (record pages 15 to 16). The complaint filed by the Defendant in Error, Carolina-Tennessee Power Company, plaintiff in the Court below, is set out on pages 16 to 21 of the record, and was filed August 21, 1914. The answer of the plaintiff in error, defendant below, Hiawassee River Power Company, is set out on pages 21 to 30, and was filed the 13th day of November, 1914. The reply of the defendant in error is set out on pages 31 to 34 of the record.

Upon this original complaint and the answer and the reply above referred to, the cause was tried in the Superior Court of Cherokee County, North Carolina, at the April Term, 1915, (bottom page 259) and resulted in a judgment in favor of the plaintiff, from which both parties appealed. (Record page 259). These appeals were heard at the Spring Term, 1916, in the Supreme Court of North Carolina, and an opinion was filed by Walker, Judge, March 29, 1916. (Record page 259, 260) wherein a new trial was granted to the Hiawassee River Power Company for errors pointed out in the opinion of the Court, printed in this record on pages 267 to 269. (See Power Co. v. Power Co., 171 N. C., 248). The opinion of the Supreme Court of North Carolina on the first appeal is set out in full in this record, (pages 259 to 269).

After this new trial had been granted the defendant in error, Carolina-Tennessee Power Company, by permission of the Court, filed an amended complaint (record pages 34 to 39). This complaint was filed June 27, 1916. To this complaint the plaintiff in error, defendant below, filed an amended answer (record pages 39 to 45); to the amended answer the plaintiff below filed another answer, or reply (record pages 45 to 47). This last pleading was

filed October 26, 1916. Thereafter at April Term, 1917, the cause came on for hearing again in the Superior Court of Cherokee County, North Carolina (record page 15), and resulted in a verdict and judgment in favor of the defendant in error. The verdict is set out on page 48 of the record and the judgment appealed from on pages 48 to 50. From this judgment the plaintiff in error, Hiawassee River Power Company, again appealed to the Supreme Court of North Carolina (record page 50), and at the Spring Term, 1918, of the Supreme Court of North Carolina the judgment in favor of the defendant in error was affirmed. This judgment of affirmance is set out in the record on page 285. The opinion of the Supreme Court of North Carolina affirming the judgment now sought to be reversed, is set out in full in the record pages 270 to 285.

3. FACTS OF THE CASE.

Defendant in error, Carolina-Tennessee Power Company, is a corporation organized under the laws of the State of North Carolina, by virtue of an Act of the General Assembly of said State, ratified the 16th day of February, 1909, being chapter 76 Private Laws of North Carolina, 1909. This Act of the General Assembly is set out in full in the record (pages 204-214). From this Act it will be seen that the defendant in error is a public service corporation and empowered to supply the public and municipalities with electric current for power, light, heat and other purposes, and is authorized to locate, build, maintain and operate hydro-electric plants on any non-navigable stream in the State of North Carolina, and whenever the lands and waters necessary for the purposes of the Corporation cannot be obtained by purchase, said corporation is authorized, after having surveyed, staked out, and located its public works (record page 209), and filed surveys of the same in the office of the Clerk of the Superior Court in the County in which the land lies (record page 209), to take such lands by condemnation, by paying the value therefor, to be assessed by a jury as provided by law.

In exercising the powers conferred upon the defend-

ant in error by its charter, the defendant in error in the year 1909 surveyed out on the Hiawassee River in Cherokee County, North Carolina, locations for two hydro-electric plants, and on the 21st day of June, 1911, filed in the office of the Clerk of the Superior Court of Cherokee County, plats or maps of said locations as provided by its charter. Thereafter, and before the organization of the Hiawassee River Power Company, the defendant in error began to acquire and did acquire by deeds in fee simple, made to it prior to the commencement of this action, fifty per cent. of the water front along the banks of the Hiawassee River, necessary for its two hydro-electric plants, and had contracts for substantially twenty-five per cent. more of said river frontage, making in all at the commencement of this action seventy-five per cent. of the river frontage held in fee simple and under contract by the defendant in error. (Record page 110). The proposed developments of the defendant in error consisted of two hydro-electric plants situated on the Hiawassee River in Cherokee County, North Carolina, as represented on the plats attached to the record marked Exhibit 7 and Exhibit 7-A, and Exhibit 7-E, between pages 224 and 225. Exhibit 7-A shows the lands and waters surveyed out for the Upper Development on the Hiawassee River. This development contemplated a dam of one hundred and fifty feet in height to be erected at the place marked "dam site" on the plat, and will pond the water back for about thirteen miles. The other development represented by Exhibit 7 was of a similar size and contemplated the erection of a dam on the land marked "Southern Extract Company," near the State line, at the North end of the plat, and which dam was to be about one hundred and fifty feet in height and would back the water almost to the first dam above mentioned. These Exhibits 7 and 7-A are copies of the plats that were filed in the office of the Clerk of the Superior Court of Cherokee County, on the 21st day of June, 1911, as required by law. Exhibit 7-E is a consolidated plat showing both developments. This last plat is on a smaller scale than the other two and the lands marked in red on the plat represent the river frontage and lands owned in fee sim-

ple by the defendant in error at the commencement of this action.

The defendant in error immediately after the making of said surveys and locating said public works, by proper corporate action, duly adopted said locations as required by the laws of North Carolina.

4. VERDICT OF THE JURY.

Upon the trial at Spring Term, 1917, in the Superior Court of Cherokee County, all of the facts in dispute in this cause were determined by a jury in favor of the defendant in error, plaintiff below, on issue submitted to the jury under the instructions of the Court, which issues and answers thereto were as follows:

ISSUES

"1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint, and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A?

Answer: Yes, by consent.

"2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint?

Answer: Yes.

"3. Did the plaintiff prior to the commencement of this action, on the 21st day of August, 1914, abandon its said locations and proposed plans as alleged in the answer?

Answer: No.

"4. Did the plaintiff file the maps or plats of its said locations in the office of the Clerk of the Superior Court of Cherokee County on or about June 21, 1911, as alleged in the complaint?

Answer: Yes.

"5. Did the plaintiff on or about the 17th day of August, 1914, by authoritative corporate action, adopt

the surveys and locations for its dams, reservoirs and public works, which had theretofore been made and marked out on the Hiawassee River, as alleged in the complaint?

Answer: Yes. (By consent).

"6. Were the locations for the dams, reservoirs and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer?

Answer: Yes. (By consent).

"7. If so, did the defendant thereafter by authoritative corporate action adopt said locations, and if so, when?

Answer: No."

Upon this verdict the judgment in favor of the defendant in error was entered in the trial court and this judgment was affirmed on appeal by the Superior Court of North Carolina.

The Carolina-Tennessee Power Company immediately upon its organization on the 28th day of May, 1909, (Exhibit 3, record pages 216 to 220) entered into a contract with the Carolina Construction Company for the building of the dams and the erection of the hydro-electric plants above mentioned, which contract is set out in the record on page 222. The Carolina Construction Company made a contract dated the 13th day of July, 1909, with the Ambursen Hydraulic Construction Company, which contract is set out as Exhibit 14-A (pages 226-230 of the record), whereby the Ambursen Company was to do the necessary surveying, prepare the plans and designs, furnish material, supplies, tools and other things necessary for the construction of said hydro-electric plants. *The defendant in error was proceeding in the regular way to make its proposed development when its work was interfered with by the plaintiff in error, in consequence of which this action was brought.*

5. CLAIMS OF HIAWASSEE RIVER POWER COMPANY.

The Hiawassee River Power Company, plaintiff in error, is a corporation organized under the laws of North Carolina by a certificate issued by the Secretary of State of North Carolina, dated 15th day of July, 1914 (record page 244 to 248). Said Corporation was organized July 15, 1914 (record page 255). Immediately after the organization of said Hiawassee River Power Company, the lands and property claimed by it in this proceeding were conveyed to it by deed dated July 15, 1914 (record pages 248 to 254). Some of the lands claimed by the Hiawassee River Power Company are situated on the Hiawassee River within the basins which would be formed by the dams proposed to be built by the Carolina-Tennessee Power Company, and all the lands bordering on the river were necessary for and included in the proposed developments of the Carolina-Tennessee Power Company. The Carolina Company could not make its developments without overflowing all of the lands bordering on the Hiawassee River so purchased by the Hiawassee Company.

In addition to having purchased the lands referred to, the Hiawassee Company claimed that it had located and proposed to build two hydro-electric plants, one of which it claimed to have located on the Hiawassee River in the lower reservoir of the Carolina-Tennessee Power Company's property, and at a place about three miles above the Carolina Company's lower dam, and the other it claimed to have located in the Carolina Company's upper reservoir, and at a place about three miles above its upper dam. The proposed dams of the Carolina Company would overflow and destroy the dams which the Hiawassee Company claims it intended to build, and it was therefore impossible that both companies could construct their public improvements on the same river practically at the same place.

The jury, however, found by the verdict in this case, and upon ample evidence to sustain it (see 7th issue, record page 48), that the defendant *had not by authoritative*

corporate action adopted said locations as required by law.

At the commencement of this action the Hiawassee River Power Company owned in fee simple three tracts of land with a river frontage of fifty-seven hundred (5700) feet, or 1.08 miles, and had under contract and condemnation proceedings other river frontage, nearly all of which was claimed under contracts and deeds by the Carolina-Tennessee Power Company.

It is thus seen that the controversy in this case in the courts of North Carolina was, which company had the prior right to develop the water power on the Hiawassee River.

The jury to which the cause was submitted found by the verdict that the defendant in error had the prior right to develop these water powers by reason of the acts done by it, and the trial Court rendered a judgment according to the verdict, which judgment was affirmed on appeal to the Supreme Court of North Carolina. The plaintiff in error now seeks to have this judgment reversed.

It is apparent from an examination of the facts appearing in this record that the plaintiff in error has no legal or equitable right to interfere with the proposed developments of the defendant in error and that its acquisition of the properties described in the deed of conveyance of July 15, 1914, six days prior to the commencement of this action, was for the purpose and only for the purpose of holding up or interfering with the proposed developments of the defendant in error.

The defendant in error prior to the commencement of this action had acquired a large portion of the property necessary for its developments and had invested in the lands necessary for its proposed developments and in engineering, surveying and other like expenses, \$111,000.00 (Record 57, 110).

ARGUMENT

NO FEDERAL QUESTION INVOLVED

1. There is no Federal Question involved in this cause, and this Honorable Court has therefore no jurisdiction. A most careful examination of the record in this cause will show that no Federal question is in any way or manner involved in the controversy. A reading of the pleadings, which are fully set out in the record, shows that no Federal question was pleaded, raised, or suggested in any way or manner whatsoever by the pleadings. A reading of the instructions of the trial court to the jury (record pages 174 to 190) will show that no Federal question was considered, suggested, or thought of by the trial Court in the instructions to the jury. A reading of the assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina, which assignments of error are set out in the record on pages 194 to 204, will show that no Federal question was thought of, suggested, or raised in any manner whatsoever by counsel for the plaintiff in error on that appeal. A reading of the opinion of the Supreme Court of North Carolina, which is set out in full in the record (pages 270 to 285) will show that no Federal question had been argued before the Court, considered by the Court, or decided by the Court. There is absolutely no Federal question in the case. No statute of the United States, no right arising under a statute of the United States, no part of the constitution of the United States and no right arising under the constitution of the United States was in any way or manner by pleading, motion, request for instruction or in any other way, suggested, raised, or considered, either in the trial court or in the Supreme Court of North Carolina. In fact no such question could have been considered because no such question was involved.

2. The Supreme Court of the United States on writs of error to a State Court will consider only Federal questions.

“But according to the well-settled doctrine of this court with regard to cases coming from State courts,

unless a decision upon a Federal question was necessary to the judgment or, in fact, was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another which is adequate by itself and which contains no Federal question, the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. *Murdock v. Memphis*, 20th Wallace 590; *Hall v. Akers*, 132 U. S., 554."

Arkansas So. RR. v. German Bank, 207 U. S., 270, 275.

"It is admitted that the general and well-settled rule is that in a case coming from a State court this court can consider only Federal questions, and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions."

Leathe v. Thomas, 207 U. S., 93, 98.

"It is enough to refer to *Murdock v. Memphis*, 20th Wallace, 590, where, after great consideration, it was held that under the judiciary act as amended to its present form this Court was limited to the consideration of the Federal questions named in the constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed by them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and not be insensibly tempted beyond them by the thought that an unjustified or a harsh rule of law may have been applied by the State Courts in the determining of a question committed exclusively to their care."

Sauer v. New York, 206 U. S., 536, 546-547.

In the case of *Presser v. Illinois*, 116 U. S., this Court, after stating that the questions involved, arose under the general corporation law of the State of Illinois, says:

"In respect to these points we have to say that they

present no Federal question. It is not, therefore, our province to consider or decide them."

Presser v. Illinois, 116 U. S., 269.

Harding v. Illinois, 196 U. S., 78, 83.

3. JURISDICTION CONSIDERED FIRST.

"In every case which comes to this Court on writ of error or appeal, the question of jurisdiction must first be answered whether propounded by counsel or not."

Giles v. Teasley, 193 U. S., 146, 160.

"Has this Court authority to review the judgment of the Circuit Court of Appeals in this case?

"This question arises upon the face of the record and cannot be ignored; for the rule is well established that, 'On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court and then of the court from which the record comes.' *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S., 379, 382; *Kingbridge Co. v. Otoe Co.*, 120 U. S., 225; *Martin v. B. & O. RR. Co.*, 151 U. S., 673, 690; *Powers v. C. & O. Ry. Co.*, 169 U. S., 92, 98; *Great Southern Fireproof Hotel Co., v. Jones*, 177 U. S., 449, 453."

Continental National Bank v. Buford 191 U. S., 119, 120.

"The fundamental question of jurisdiction first of this Court and then of the Court from which the record comes presents itself on every writ of error or appeal and must be answered by the court whether propounded by counsel or not."

Defiance Water Co. v. Defiance, 191 U. S., 184, 194.

In the case of *M. C. and L. M. R. R. Co. v. Swan*, 111 U. S., 382, this honorable court says:

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of

the judicial power of the United States, is inflexible and without exception, which requires this court of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

4. RECORD MUST SHOW FEDERAL QUESTION INVOLVED

Harding v. Ill., 196 U. S., 78, 84; Ocean Insurance Co. v. Polleys, 13 Pet., 164; Taylors Jurisdiction and Procedure, Section 242.

5. HOW FEDERAL QUESTIONS MUST BE RAISED

"The proper way is by pleading, motion, exception or other action part or being made part of the record showing that the claim was presented to the Court. Loeb v. Trustees, 179 U. S., 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. Sayward v. Denny, 158 U. S., 180, Zadig v. Baldwin, 166 U. S. 488. The assertion of the right must be made unmistakably and not left to mere inferences."

Oxley Stave Co., v. Butler Co., 166 U. S. 648.

6. FEDERAL QUESTION CANNOT BE FIRST RAISED BY ARGUMENT IN STATE SUPREME COURT

Loeb v. Trustees, 179 U. S., 472, 483.

In the case of Sayward v. Denny, 158 U. S., 180, 183, this Court says:

"As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under any State was drawn in question it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the State, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed. And in that regard, certain propositions must be regarded as settled. 1. That the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below. *Powell v. Brunswick County*, 150 U. S., 433, 439, and cases cited. 2. That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way. *Miller v. Texas*, 153 U. S., 535; *Morrison v. Watson*, 154 U. S., 111, 115, and cases cited. 3. That such claim cannot be recognized as properly made when made for the first time in a petition for rehearing after judgment. *Loeber v. Schroeder*, 149 U. S., 580, 585, and cases cited. 4. That the petition for the writ of error forms no part of the record upon which action is taken here. *Butler v. Gage*, 138 U. S., 52, and cases cited. 5. Nor do the arguments of counsel, though the opinion of the state courts are now made such by rule. *Gibson v. Chouteau*, 8 Wall. 314; *Parmelee v. Lawrence*, 11 Wall. 36; *Gross v. U. S., Mortgage Co.*, 108 U. S., 477, 484; *United States v. Taylor*, 147 U. S., 695, 700. 6. The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. *Hoyt v. Sheldon*, 1 Black, 518; *Maxwell v. Newbold*, 18 How. 511, 515. 7. Or, at all events it must appear from the record, by clear and necessary intendment, that the Federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession

of the right must be distinctly deducible from the record before the state court can be held to have disposed of such Federal question by its decision. *Powell v. Brunswick County*, 150 U. S., 433.

"Tested by these principles it is quite apparent that this writ of error must be dismissed."

Baldwin v. Kansas, 129 U. S., 52, 57.

Maxwell v. Newbold, 18 Howard, 511, 515.

7. FEDERAL QUESTION CANNOT BE RAISED BY PETITION FOR WRIT OF ERROR.

An examination of the record in this case will show beyond all question that absolutely no Federal question was at any time suggested, set up, claimed, argued, or considered until the same was attempted to be set up by the petition for writ of error on the 17th day of August, 1918, nearly three months after the decision of the case in the Supreme Court of North Carolina. The Federal question cannot be raised in this manner.

"It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error."

Mutual Life Insurance Co., v. McGrew, 188 U. S., 291, 308.

"The petition for writ of error forms no part of the record upon which action is taken here. *Butler v. Gage*, 138 U. S., 52, and cases cited."

Sayward v. Denny, 158 U. S., 180, 183.

In *Butler v. Gage*, supra page 56, this court says:

"This brings us to consider whether the record before us so presents a Federal question as to justify the maintenance of the writ, and it may be remarked in the outset that the petition for writ of error forms no part of the record upon which action is taken here. *Manning v. French*, 133 U. S., 186; *Clark v. Pa.*, 128 U. S., 395; *Warfield v. Chaffe*, 91 U. S. 690."

Johnson v. New York Life Ins. Co., 187 U. S., 491, 495.

8. FEDERAL QUESTION CANNOT BE RAISED
FOR THE FIRST TIME IN ASSIGNMENTS
OF ERROR TO THIS COURT.

As stated above, the first intimation or suggestion of a Federal question in this case arises in the petition for the writ of error. We next find, upon examination of the record, that an attempt has been made in the assignments of error to this Court (record page 3-6), to raise Federal questions. No Federal question was raised or considered either in the trial court or in the Supreme Court of North Carolina. The assignments of error on the appeal from the Superior Court of Cherokee County, North Carolina, to the Supreme Court of North Carolina, are set out in full on pages 194 to 204, and if any Federal question had been involved in the case it should have and must have been set up at least in those assignments of error.

To attempt to set up such questions in the assignments of error to this Court is too late.

Cleveland, etc., R. R. Co. v. Cleveland, 235 U. S., 50, 53.

In the case just cited, this Court says: "It is equally well settled that the contention made and passed upon in the State court cannot be enlarged by assignments of error made to bring the case to this court."

No Federal question was raised in the State courts, and the attempt to raise a Federal question in the assignment of errors in this court not only came too late but was palpably non-maintainable. Chapin v. Fye, 179, U. S., 127."

Mallors v. Trust Co., 216 U. S., 614.

Harding v. Ill., 196 U. S., 78, 84.

"The bill of exceptions shows that the plaintiff in error did not bring to the attention of the trial court that the Act of the State under which the assessment was made, or any of the proceedings, were contrary to the Fourteenth Amendment to the Constitution of the United States, nor did he assign as error on appeal to the Supreme Court that the ruling of the trial court or its judgments infringed that amendment."

"It is urged that in the writ of error and petition for citation, it is stated that certain rights and privileges were claimed under the Constitution of the United States and that the Supreme Court of the State of Illinois decided against such rights and privileges and it is further urged that the Chief Justice of the Court allowed the writ of error. This is not sufficient."

Hulburt v. Chicago, 202 U. S., 275, 279-280.

"In the case at bar an elaborate assignment of error for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of paragraph 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the State court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist. *Harding v. Illinois*, 196 U. S., supra, and previous cases in this court therein cited."

Appleby v. Buffalo, 221 U. S., 529.

"It is hardly necessary to say that the raising of such a question in the assignments of error in this court is not sufficient."

New York Central R. R. Co. v. N. Y., 186 U. S., 269, 273.

9. PROPER TIME TO RAISE FEDERAL QUESTIONS.

The proper time to raise a Federal question is in the trial court, whenever that is required by the State practice.

"The proper time is in the trial court whenever that is required by State practice in accordance with which the highest court of a State will not revise the judgment

of the court below on questions not therein raised. *Spies v. Ill.*, 123 U. S., 131; *Jacobi v. Ala.*, 187 U. S., 133; *Layton v. Mo.*, 187 U. S., 356; *Erie R. R. Co. v. Purdy*, 185 U. S., 148."

Mutual Life Ins. Co. v. McGrew, 188 U. S., 291, 308.

10. The Supreme Court of North Carolina considers no question not set out in exceptions or assignments of error, to rulings of the trial court.

The rules of practice in the Supreme Court of North Carolina provide fully what questions will be considered in that court. Rule 27, 164 N. C., page 548, reads as follows:

"Exceptions.

"27. How assigned:

"Every appellant shall set out in his statement of case served on appeal, his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in the case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record shall be considered by this court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment."

"We have repeatedly held that cases on appeal in the nature of bills of exceptions are understood to present only such errors as are assigned, and we cannot allow defects to be searched for and made grounds of complaint not contemplated in the appeal."

Davis v. Council, 92 N. C., 725, 731.

"It would be unnecessary to reiterate the rule long and uniformly adhered to which limits the appellate jurisdiction of this court to such exceptions as are shown in the record to have been taken in the court below including

an instruction which lays down a false proposition of law but for the wide range of the argument for the appellant. 'For the best reasons,' remarks Ruffin, C. J., 'it is entirely settled that the Court can take no notice of an error not apparent in the record, that is in the pleadings, verdict, or judgment, unless the appellant except to it at the trial.'

Phipps v. Pierce, 94 N. C., 514, 515.

Again, in the same case, the Supreme Court of North Carolina says:

"Only such alleged errors in the proceedings on the trial as the appellant may think proper to assign and set forth therein" can be considered by the State Supreme Court.

Phipps v. Pierce, *supra*, 516.

Lytle v. Lytle, 94 N. C., 522, 524.

Anthony v. Estes, 99 N. C., 598.

"Error as has been decided in many cases, must be assigned in the case stated or settled on appeal, or in the record of the cause or proceedings in the action, unless the error is apparent in the essential parts of the record as pointed out above."

Thornton v. Brady, 100 N. C., 38, 40.

Wallace v. Robinson, 100 N. C., 206, 210.

"There are no assignments of error in the record as required by rule 27 of this court. The appellant moves to affirm the judgment on that ground and the motion must be allowed, there being no errors apparent on the face of the record proper."

Pegram v. Hester, 152 N. C., 765.

"We must insist upon a strict compliance with the rule, which requires an assignment of the errors relied on in this Court. It is a most reasonable rule, because the appellant is thereby notified of the specific matters which will be involved in the appeal; it enables counsel to prepare their case with greater ease, eliminating all immaterial questions; and, lastly, but by no means the least of all, it places before the Court in condensed form the entire case, so that we can the more readily under-

stand the argument of counsel and consider the case more intelligently, as the discussion before us progresses. But it is sufficient to say that it is the rule of this Court, which was adopted after mature consideration, and is far less drastic or exacting in its requirements than similar provisions in other appellate tribunals, where even an assignment of errors, strictly conforming to our rule, would not be tolerated for a moment. We have more than once held with some degree of emphasis, that this as well as the other rules of the court, will be enforced, reasonably, of course but according to their plain intent and purpose. In this case it seems that the appellant failed to comply with the rules which required the errors, which were pointed out by exceptions, taken during the course of the trial, to be grouped and numbered or assigned in an orderly manner. We are therefore not permitted to consider the able and carefully prepared brief of his counsel, or to enter upon a consideration of the case upon its merits. It is our duty, though under the statute, to examine the record. We have done so, and find no error therein. The appellee moves to affirm the judgment, under the rule as construed by this court, in *Davis v. Wall*, 142 N. C., 450; *Marable v. R. R.*, 142 N. C., 564; *Lee v. Baird*, 146 N. C., 361; *Thompson v. R. R.*, 147 N. C., 412; *Ullery v. Guthrie* 148 N. C., 417. As the case is now presented to us we must allow the motion and affirm the judgment. Affirmed."

Smith v. Manufacutring Co., 151 N. C., 261.

The refusal to give instructions will not be reviewed unless assigned as error.

Davis v. Duval, 112 N. C., 833, 834.

McKinnon v. Morrison, 104 N. C., 354, 361.

11. FEDERAL SUPREME COURT WILL NOT REVIEW QUESTIONS OF FACT.

All of the questions of fact and issues of fact in this case were found by the jury in the trial court in favor of the defendant in error and against the contentions of the plaintiff in error. As before shown no Federal question was raised in the State Supreme Court, therefore there

is no question for this court to consider. This court on writs of error to State Supreme Courts confines its rulings to questions of law only.

"In cases coming from a State court we do not review questions of fact but accept the conclusions of the State tribunals as final."

Chrisman v. Miller, 197 U. S., 313, 319.

"It is the settled rule that this Court in an action at law at least, has no jurisdiction to review the conclusions of the highest Court of a State upon questions of fact. *Riverbridge v. Kas. Pac. R. R. Co.*, 92 U. S., 315; *Dower v. Richards*, 151 U. S., 658; *Israel v. Arthur*, 152 U. S., 355; *Noble v. Mitchell* 164 U. S., 367; *Herrick v. Acheson*, etc., R. R. Co., 167 U. S., 673, 677; *Turner v. N. Y.*, 168 U. S., 90, 95; *Egan v. Hart*, 165 U. S., 188."

Clipper Mining Co. v. Eli Mining Co., 194 U. S., 220, 222.

"On error, however, to a State court, this court cannot reexamine the evidence and when the facts are found below is concluded by such finding."

Egan v. Hart, 165 U. S., 188, 189.

"The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many respects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to reexamine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the state.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709 Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the

State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby v. Boyd*, 128 U. S., 488; *Egan v. Hart*, 165 U. S., 188; *Dower v. Richards*, 151 U. S., 658; *Thayer v. Spratt*, 189 U. S., 346. We shall not, therefore undertake to follow counsel in the consideration of all the questions argued but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case."

Waters-Pierce Oil Co. v. Texas, 212 U. S., 97.

The verdict of the jury settles all questions of fact. In *Mo., Kan., etc., R. R. Co. v. Haber*, 169 U. S., 613, 639, it is said: "Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury and this court can only consider whether the statute as interpreted to the jury was in violation of the Federal constitution."

Smiley v. Kan., 196 U. S., 447, 453.

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California, is that its decision in matter of fact was erroneous and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this Court."

Dower v. Richards, 151 U. S., 658, 663.

12. WHEN DECISION FOUNDED UPON STATE OR
LOCAL QUESTION WRIT OF ERROR
DISMISSED.

"It is manifest no Federal question was passed on by the Court. Its decision was put upon an independent ground, involving no Federal question, and of itself sufficient to support the judgment."

White v. Leovy, 174 U. S., 91, 95.

"In *Remington Paper Company v. Watson*, 173 U. S.,

443, we had occasion to repeat and affirm the rule announced in *Eustis v. Bowles*, 150 U. S., 361, 366-367."

White v. Leovy, 174 U. S., 91, 95.

Chicago & N. W. Ry. Co. v. Chicago, 164 U. S., 454, 457.

13. WHERE A CASE TURNS ON NON-FEDERAL QUESTION, WRIT OF ERROR MUST BE DISMISSED.

It is settled law that to give this court jurisdiction of the writ of error to a State Court it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it."

Eustis v. Bolles, 150 U. S., 361, 366.

"It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented. Eustis v. Bolles, 150 U. S., 361."

California Powder Works v. Davis, 151 U. S., 393.

Holden Land Co. v. Interstate Trading Co., 233 U. S., 536, 541.

Leathe v. Thomas, 207 U. S., 93, 98-99.

Giles v. Teasley, 193 U. S., 146, 160.

Rogers v. Jones, 214 U. S., 196, 202.

"We need not, however, consider this contention. For since the Supreme Court rested its judgment upon a non-federal ground, adequate to support it, the existence of a Federal question is of no significance. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S., 300. (303); and, besides, the attempt to raise it comes too late. *St. Louis and San Francisco R. R. Co. v. Shepard*, 240 U. S., 240."

Bilby v. Stewart, 246 U. S., 255, 257.

14. GRANTING OF WRIT OF ERROR BY CHIEF
JUSTICE OF STATE SUPREME COURT IS NOT
SUFFICIENT TO SHOW FEDERAL
QUESTION INVOLVED

"It is urged that in the writ of error and petition for citation, it is stated that certain rights and privileges were claimed under the Constitution of the United States, and that the Supreme Court of the State of Illinois decided against such rights and privileges, and it is further urged that the Chief Justice of the Court allowed the writ of error. This is not sufficient."

Hulburt v. Chicago, 202 U. S., 275, 280.

Marvin v. Trout, 199 U. S., 212, 223.

Louisville and Nash. R. R. Co. v. Smith, 204 U. S., 551, 561.

In the case of *Marvin v. Trout*, *supra*, it is said:

"It is well settled in this court that a certificate from a presiding judge of the State Court made after the decision of the case in that court, to the effect that a Federal question was considered and decided by the Court, adversely to the plaintiff in error, cannot confer jurisdiction on this Court where the record does not otherwise show it to exist; that the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the Federal question."

Dibble v. Bellingham Bay Land Co., 163 U. S., 63;

Hinkle v. Cincinnati, 177 U. S., 170;

Fullerton v. Texas, 196 U. S., 192.

15. STATE COURTS DETERMINE POWERS OF STATE CORPORATIONS.

A great deal is said in the brief of the plaintiff in error in this case about the franchise, powers and rights of the Carolina-Tennessee Power Company, defendant in error. It is well settled that it is solely the province of State courts to determine the power of State corporations concerning all local matters.

In Taylor on Due Process of Law, Section 428, we find the rule states as follows:

"Domestic corporations are the creatures of the State, and the State has clear right to regulate its own creations. The power of classification upheld by the Supreme Court admits of discriminations between domestic corporations and also between foreign corporations."

"Again, the decision by a state court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 'The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as the legislature may judge most befitting to its interests and policy.' Home Ins. Co. v. New York, 134 U. S., 594, 600; Perrine v. Chesapeake & Delaware Canal Co., 9 How. 172, 184; Horn Silver Mining Co. v. New York 143 U. S., 305-312."

Berea College v. Kentucky, 211 U. S., 45, 54.

This Court in the case of Home Insurance Co. v. New York, 134 U. S., 599, says:

"The right or privilege to be a corporation or do business as such body, is one generally deemed of value

to the corporators or it would not be sought in such numbers as at present. It is the right or privilege by which several individuals may unite themselves under a common name and act as a single person with a succession of members without dissolution or suspension of business, and with a limited individual liability. The granting of such rights or privileges rests entirely in the discretion of the State, and of course, when granted may be accompanied with such conditions as its legislature may adjudge most befitting to its interest and policy."

"The granting of rights and privileges which constitute the franchise of the corporation being a matter resting entirely within the control of the legislature to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interest and policy."

Horns Silver Mining Co. v. N. Y., 143 U. S., 305, 313.

Chicago Life Ins. Co. v. Needles, 113 U. S., 574, 579, 580.

In a case before this Honorable Court there was a contention made that by certain acts of the Legislature of the State of Kentucky, a corporation had not been created. This Court said: "Counsel criticised this ruling severely asserting that corporations are never created by implication and that there is in the Acts of 1869, in terms, no attempt to create one. But this is a matter of a purely local nature. A corporation may be formed in any manner that a State sees fit to adopt, and when the highest court of a State decides that by certain legislation a corporation has been created, such decision concludes not only the courts of the State but also those of the United States. It is a matter over which we have no review, and in respect to which the decision of the State Court is final."

Hancock v. Louisville R. R., 145 U. S., 409, 415.

Again, in the case of *Chicago B. & Q. R. R. Co. v. Ill.*, 200 U. S., 561, which was a case involving the police power and due process of law, it was held that a State's police power embraces regulations framed to promote

the public convenience or the general prosperity as well as those designed to promote the public health, the public morals, or the public safety. In that case the Court said: "We hold that the police power of the State embraces regulations designed to promote the public convenience or the general prosperity, as well as the regulations designed to promote the public health, the public morals, or the public safety. *Lakeshore and M. S. R. R. Co. v. Ohio*, 173 U. S., 285, 292; *Gilman v. Phil.*, 3rd Wallace, 713, 729; *Pound v. Turk*, 95 U. S., 459, 464. *Hannibal and St. J. R. Co. v. Husen*, 95 U. S., 470."

Bacon v. Walker, 204 U. S., 311.

16. CASES EXACTLY IN POINT.

In two cases which heretofore came to this court, many of the questions herein discussed have been expressly and directly decided. The question of jurisdiction has been decided, and also the questions raised by the brief of the plaintiff in error as to the powers of State corporations and also as to the right of one corporation to acquire priority by appropriation in the utilization of a water power. The case of *Telluride Power Transmission Co. v. Rio Grande, etc., Railway Co.*, 175 U. S., 639, is exactly in point in this controversy. The case referred to was exactly like our case, and brought for substantially the same purpose. In discussing this case we will refer to the plaintiff in error in the case as the "Power Company," and the defendant in error as the "Railway Company."

The action was brought in one of the State courts of Utah by the Railway Company against the Power Company to confirm and quiet the title and right of the Railway Company to build and operate a railway in Provo Canyon, Utah. The Railway Company had surveyed the location of its railroad through this canyon, and alleged that the Power Company had set up an adverse claim to the land over which the railway had been located.

It further appeared that the Power Company was a corporation organized under the laws of Colorado and

claimed that in 1894 it had entered upon Provo Canyon, made surveys and located a dam and had appropriated the land in controversy for the use of a reservoir for waterpower purposes; that it had located a dam which would overflow the right of way claimed by the Railway Company. The Power Company claimed that it had made its location prior to the time the railway company had located. In the opinion of the Court the facts are stated as follows, (page 641):

"The case was tried by the Court without a jury. Findings of fact and conclusions of law were made by the Court to the effect that the plaintiff (Railway Company) had prior possession of the land, and that the adverse claim of the defendants (Power Company) was unfounded. A judgment was thereupon entered in favor of the plaintiff; its title to the lands in question confirmed and quieted; the adverse claim adjudged invalid, and the defendants enjoined from setting up claims or exercising rights adverse to those of the plaintiff. From this judgment defendants, the Telluride Power Company and Nunn, took an appeal to the Supreme Court of Utah, which affirmed the judgment of the District Court, whereupon these defendants sued out a writ of error from this court, assigning, amongst other things, as error, the failure of the district court to remove the case to the Circuit Court of United States."

After disposing of the questions of removal this honorable Court then proceeded to determine the question of the jurisdiction of the court and decided that this court had no jurisdiction of the writ of error. In the discussion of the case this court says further: "But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or, at least, to disprove priority on the part of the plaintiff. The question, *who had acquired this priority of possession was not a Federal question but a pure question of fact upon which the decision of the State Court was conclusive.*" (page 645). (Italics are ours). On examination, the Telluride Power Company case will show that it is exactly in point here.

The right to occupy and use lands along a river were

in dispute. Both parties claimed priority of right; the State courts decided in favor of the Railway Company and *enjoined the Power Company from interference*, and this Court held that no Federal question was involved, although the Power Company claimed its rights under a Federal statute. This was held so because the State courts found that the Power Company had failed to bring itself within the Federal Statute and that such holding was one for the State courts only. Discussing this question, this Court said (page 647): "But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws and decisions. *These were local and not Federal questions.* The jurisdiction of this Court in this class of cases does not extend to questions of fact or of local law which are merely preliminary to or the possible basis of a Federal question."

Another phase of the same controversy was presented to this Court in the case of Telluride Power Company v. Rio Grande Railroad Company, reported in 187 U. S., at page 569. This case was an action by the Railway Company to condemn lands claimed by the Power Company. The case proceeded to judgment in favor of the Railway Company, and against the Power Company condemning the identical land over which it was decided, in the case reported in 175 U. S., at page 639, that the Railway Company had a prior right of appropriation. The Court again passes upon several of the questions involved in the controversy now before the Court, and following the decision in the previous case, held that it had no jurisdiction and dismissed the writ of error.

The defendants in the State Court claimed a violation of the Fourteenth Amendment and a deprivation of the rights of the plaintiff in error thereby, but this Court says that it appeared for the first time in the petition for writ of error from this Court, that the defendants claimed such Federal right, and further held as follows (page 584): "But their rights under that section (section 2339

Revised Statutes of U. S.) depended upon questions of fact and questions of local law. The questions of fact were found against plaintiff in error and the question of local law we cannot revise." The writ of error was therefore dismissed.

17. THIS WRIT OF ERROR SHOULD BE DISMISSED.

Under the foregoing authorities this writ of error should be dismissed for many reasons, summarized as follows:

First, no Federal question was involved in the controversy in the State trial court nor in the State Supreme Court, nor is involved in the case now. The questions raised by the pleadings, the questions determined by the jury, and the decisions upon law, are all purely local questions and are not subject to be reviewed in this court.

Second, no attempt was made either in the trial court or in the State Supreme Court to raise a Federal question.

Third, it is too late to raise a Federal question by a petition for writ of error, or by assignments of error.

Fourth, the fact that the Chief Justice of the State Supreme Court certified that Federal questions were involved does not help out a defective record.

Fifth, the decision of the State Supreme Court in this case considered no Federal question or Federal right, and the assignments of error in the State Supreme Court raised no Federal question, and under the North Carolina State practice no error will be considered in the Supreme Court of North Carolina which was not properly assigned. (Rule of Practice 27 hereinbefore set out). The practice as to exceptions in the State Supreme Court is summarized in the case of *Taylor v. Plummer*, 105 N. C., at page 56, and may be stated as follows:

"1. Exceptions to evidence and all matters occurring on the trial, except to the charge of the court, must be noted at the time or they are waived. 2. The charge and refusal to give instructions are deemed excepted to,

though not excepted to at the time. 3. An omission to charge on any point, or to recapitulate any part of the evidence, is not usually ground of exception, unless there was a prayer for instruction asked and refused, or the omission of the evidence was called to the attention of the court at the time. 4. All exceptions, including those to the charge, are deemed abandoned, unless set out by appellant in making up his case on appeal. 5. Errors upon the face of the record proper (as distinguished from errors committed in the progress of the trial), will be corrected without assignment of error."

Clark's N. C. Code of Civil Procedure.

18. FIRST POINT OF PLAINTIFF IN ERROR.

An examination of the brief for the plaintiff in error beginning page 21, shows that it first takes the position that the charter of the defendant in error is unconstitutional and void. This question was twice presented to the Supreme Court of the State of North Carolina and has been twice passed upon by that Court and that court has held in this identical case on the two hearings in that court that the charter of the defendant in error is valid in all respects and to all intents and purposes, and, as before stated, *the questions involved are certainly questions of local law only.*

Power Co. v. Power Co., 172 N. C., 248.

Power Co. v. Power Co., 175 N. C., 668 (record pages 265-269 and pages 270 to 285).

These decisions of the Supreme Court of North Carolina in this identical case ought to settle all of the questions suggested by the counsel for plaintiff in error under this point. The plaintiff in error first takes the position that the charter of the defendant in error abridged the privileges and immunities of the plaintiff in error and deprived the plaintiff of its property without due process of law. It is pretty hard for us to see how this argument has any application whatsoever to this case. The defendant in error was chartered by an act of the General Assembly of North Carolina passed at its special session in the year 1909 (Private Laws of North Carolina, 1909, Chapter 176). The charter is set out in the

record on pages 204 to 214. At that time the plaintiff in error was not in existence. It had no property and claimed no property on the Hiawassee River in Cherokee County, North Carolina. It was not organized until July, 1914. It acquired no property until after its organization. When it was organized it was organized under the General Laws of North Carolina and was given those powers and only those powers provided for under the general statutes. How is it possible that the organization of a corporation under a special act of the General Assembly of the State in 1909 could deprive another corporation organized under the general laws of the State in 1914 of its property privileges and immunities as suggested in this case? As a matter of fact, as found by the jury the plaintiff in error has never located any public works on the Hiawassee River in Cherokee County, and has never adopted by proper corporate action any such location, and it stands in reference to this controversy, just exactly like any private person owning property along the Hiawassee River would stand, owing to the fact that it never adopted any location for its pretended public works; it is nothing but a property holder and stands exactly on the same footing as every other property holder along the river. The Supreme Court of North Carolina in the opinions above referred to, held that the charter of the defendant in error was valid in all respects.

It insisted that the charter of the defendant in error is invalid because it gives to the defendant in error powers not granted to all other corporations in North Carolina. This certainly does not raise any Federal question, and the question of local law involved has been passed upon by the State Supreme Court and held against the contentions of the plaintiff in error. The Supreme Court says: "We decided before that the charter was a valid exercise of legislative power and especially held that the fact of allowing the plaintiff to engage in private enterprise and to exercise the power of eminent domain would not invalidate it as it could purchase property as it had done for its private purposes and condemn it when necessary for its public or quasi public purposes."

Power Co. v. Power Co., 175 N. C., 676.

The Court further says:

"We considered and decided in the former appeal other objections to plaintiff's charter and to its right to proceed in acquiring riparian and other property rights on the river by means and measures set forth in the case. As far as appears, the defendant does not seem to have any right which is likely to be invaded, as the jury, by the seventh issue, have found that there was no adoption of the locations claimed by it, but we need not dwell on this matter any further, as we are of the opinion that, upon the verdict, the plaintiff is entitled to judgment regardless of this matter, as it is shown thereby that plaintiff has acquired a prior and superior right, especially by that part of it contained in the first, second, third, fourth, and fifth issues, and those issues were answered by the jury upon sufficient evidence to support the findings."

We especially call attention of the Court to the fact that under the constitution of North Carolina there is no requirement whatsoever that all corporations engaged in the same kind of business should have the same powers. In fact, the constitution of North Carolina at the time of the organization of the defendant in error, expressly provided otherwise. Article VIII, Section 1, of the Constitution of North Carolina, reads as follows: "Section 1. CORPORATIONS UNDER GENERAL LAWS. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature the object of the corporations can not be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time, or repealed."

From this section of the Constitution it appears that wherever in the judgment of the Legislature the objects of corporations could not be attained under general laws, the Legislature is empowered to create such corporations by special act. In this instance we have a case where the necessity of a special act was apparent. It was necessary in order to develop the water power on the Hiawassee River that the Company undertaking such development should have power to condemn water powers for the rea-

son that the whole reservoirs contemplated by the defendant in error cover lands and waters which might be water powers, hence, the legislature granted the charter. Besides, whether that were actually true or not, if the Legislature grants a charter to a corporation, then it is an exercise of legislative discretion and the charter cannot be attacked on the ground that the legislature had no right to grant it.

But the plaintiff in error takes the position that the charter of the defendant in error is invalid because it is not permitted to do business in the County of Swain, North Carolina. The lands in controversy in this case lie in Cherokee County. How it could be contended that the Legislature of North Carolina when granting the rights of a public service corporation to do business in one county must grant to such corporation the right to do business in all other counties in the State we are unable to understand. According to the argument of plaintiff in error, when a corporation is authorized to develop a waterpower in one county in North Carolina, it must have such power in all other counties in the State. When a railroad company is authorized to build a railroad from one point in the State to another point in the State, such railroad company must have power to build its railroad in every county in the State and from every point in the State to every other point in the State. When a Telephone company is authorized to do business in one town in the State or in one county in the State, it must be authorized to do business in all the towns and all the counties of the State. Surely this argument would not be made by any one familiar with North Carolina law. As a matter of fact the counties in North Carolina are mere creatures of the Legislature. They are recognized by the constitution of the State, but their boundaries may be changed, enlarged or diminished. They may be created or they may be destroyed by an Act of the Legislature, and are, as before stated, nothing but creatures of the Legislature, and if the argument of plaintiff in error is correct, then the creature is greater than the creator. "The Legislature at its discretion can abolish counties, *Mills v. Williams*, 33 N. C., 558, and of course, cities and

towns, *Lilly v. Taylor*, 88 N. C., 489, *Meriwether v. Garrett* 102 U. S., 472; and also all other corporations, Constitution, Article VII, Section 12, and Article VIII, Section 1, since they are all alike creatures of its will and exist only at its pleasure."

Ward v. Elizabeth City, 121 N. C., 1, 3.

"From the formation of our State government, the General Assembly has, from time to time, changed the limits of counties and has over and over again, made two counties out of one, so that, in many instances, even the name of the old county has been lost; and it would seem to an unsophisticated mind, that, where there is the power to make two out of one, there must be the corresponding power to make one out of two. In other words, as the legislature has, undoubtedly, the power to divide counties, where they are too large, that there is the same power to unite them, when they are too small: The power in both cases being derived from the fact, that by the Constitution "all legislative power is vested in the General Assembly," which necessarily embraces the right to divide the State into counties of convenient size, for the good government of the whole. Political and other collateral considerations are apt to connect themselves with the subject of corporations, and thereby give it more importance than it deserves as a dry question of law; and the unusual amount of labor and learning, bestowed on it, has tended to mystify rather than elucidate the subject. Divested of this mystery, and measured in its naked proportions, a corporation is an artificial body, possessing such powers, and having such capacities as may be given to it by its maker. The purpose in making all corporations is the accomplishment of some public good. Hence, the division into public and private has a tendency to confuse and lead to error in the investigation; for, unless the public are to be benefitted, it is no more lawful to confer "exclusive rights and privileges" upon an artificial body, than upon a private citizen."

Mills v. Williams, 33 N. C., 560.

"Article VII, Constitution of North Carolina.

"Section 1. County Officers. In each county there shall be elected biennially by the qualified voters thereof,

as provided for the election of members of the general assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners.

"Section 2. Duty of county commissioners. It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and finances of the county, as may be prescribed by law. The register of deeds shall be, ex-officio, clerk of the board of commissioners.

"Section 3. Counties to be divided into districts. It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and to report the same to the general assembly before the first day of January, 1869.

"Section 4. Townships have corporate powers. Upon the approval of the reports provided for in the foregoing section by the general assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships.

"Section 5. Officers of townships. In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervision of the county commissioners, have control of the taxes and finances, roads and bridges of the townships, as may be prescribed by law. The general assembly may provide for the election of a larger number of the justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law.

"Sec. 6. Trustees shall assess property. The township board of trustees shall assess the taxable property of their townships and make return to the county commissioners for revision as may be prescribed by law. The clerk shall be, ex officio, treasurer of the township.

"Sec. 7. No debt or loan except a majority of voters. No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.

"Sec. 8. No money drawn except by law. No money shall be drawn from any county or township treasury, except by authority of law.

"Sec. 9. Taxes to be ad valorem. All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution.

"Sec. 10. When officers enter on duty. The county officers first elected under the provisions of this article shall enter upon their duties ten days after the approval of this constitution by the congress of the United States.

"Sec. 11. Governor to appoint justices. The governor shall appoint a sufficient number of justices of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect.

"Sec. 12. Charters to remain in force until legally changed. All charters, ordinances and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this constitution.

"Sec. 13. Debts in aid of the rebellion not to be paid. No county, city, town or other municipal corporation shall assume to pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion.

"Sec. 14. Powers of general assembly over municipal corporations. The general assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article and substitute others in their place, except sections seven, nine and thirteen."

It will be seen from the foregoing sections of the

Constitution of North Carolina that the General Assembly of North Carolina has complete and unlimited control over counties with the single exceptions mentioned in sections 7, 9 and 13.

Attention is called to the fact that all of the decisions bearing on these questions set out in the brief of the plaintiff in error are decisions taken from States other than North Carolina where they have any bearing on the question, and clearly arising under constitutions different from that of North Carolina. Besides, this argument of the plaintiff in error is completely answered by the decision in this identical case now sought to be reviewed. The Supreme Court of North Carolina said (record page 276), *Power Company v. Power Company*, 175 N. C., 676, that the Legislature had the right to grant the power of eminent domain to one public service corporation without making such grant to all other public service corporations. That such grants were constitutional because they were given in consideration of public service. "No man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

Constitution of N. C., Article I, Sec. 7.

In *Re. Spease Ferry*, 138 N. C., 219, 220.

In the *Spease* case the Court, discussing the power of the General Assembly of North Carolina to pass a statute authorizing the establishment of a public ferry across a river and forbidding any other person to establish a ferry within a limited distance, says: "There can be no question as to the power of the General Assembly to pass this statute." (Page 220). Again, on page 221, the Court says: "Constitutional provisions against the granting of monopolies do not apply to the granting of such franchises and the grant may be exclusive at the pleasure of the legislature."

Again, the plaintiff in error takes the position that the charter of the defendant in error is void for the reason that the thirty days notice required by Article II, Section 12 of the Constitution of North Carolina had not been given. In the first place, it is presumed that the

notice was given before the passage of the Act by the General Assembly. There is no evidence in the record that such notice was not given. It is therefore presumed that it was given. In the second place, as has often been decided by the Supreme Court of North Carolina, and was decided in this identical case (record page 276), no such point can be raised collaterally.

Plaintiff in error further takes the position that the charter of the defendant in error is void because, as it alleges, the defendant in error was not required to file the maps of its locations but was merely required to "deposit" the same in the office of the Clerk of the Superior Court in the County where the land lies.

In the plaintiff's brief (page 37) we read: "The alleged Special Act is vicious class legislation and not the law of the land, and is violative of the Federal Constitution because it attempts to grant to appellee the right to pre-empt and condemn property by methods unknown to the forms of law, in that it allows it merely to "deposit" its surveys in the office of the Clerk of the Superior Court; whereas, other corporations and individuals in order to acquire priority of title to property or to give notice, are required either to register their conveyances or to file notice of *lis pendens*."

This statement is neither true in fact nor correct in law. The charter of the defendant in error (see record page 209, Section 8) provides for the deposit of the surveys of its public works in the office of the Clerk of the Superior Court of the County where the land lies, and then says, "That such locating of its works and *filing* of its surveys in the office of the Clerk of the Superior Court" shall have certain effects. The trial Judge in construing this charter instructed the jury (record 184) that the statute meant "filing" of the plat. So the argument of the plaintiff falls to the ground as being untrue. In fact, so far as this case is concerned, the law required the filing of the plat. In addition to this, attention is called to the fact that plaintiff in error and other electric power companies in North Carolina organized under the general law, are not required to file or deposit any plats or surveys of their works. Revisal of North Carolina,

1905, Section 1573, quoted in plaintiff's brief at page 114, reads as follows: "Provided, further, that it shall not be necessary for the petitioner to make any survey of or over the right of way, nor to file any map or survey thereof, nor to file any certificate of the location of its line by its Board of Directors."

If there were anything in the argument of the plaintiff in error that the laws must be uniform and a statute cannot cast more burden upon one corporation than it does upon another, then the defendant in error would not be required to file the plats and surveys of its locations; but, of course, there is nothing in this argument in any event. It is perfectly plain under all the decisions of the Supreme Court of North Carolina and under the authorities generally, that a State Legislature may grant certain powers to one public service corporation without granting similar powers to all other such corporations. See *Power Company v. Power Company*, 175 N. C., 676-679 (record page 276-279). In this case the Supreme Court of North Carolina, discussing the validity of the charter of the defendant in error, said: "*In our case there is nobody competent to raise the questions as the jury have found that defendant has no vested interest to be impaired, not having adopted any plan of improvement and no condemnation of property having been attempted by the plaintiff, and no one in the accepted territory being a party to the suit. There is, therefore, no wrong done to the defendant, and no violations of its constitutional rights. The Legislature is neither partial nor discriminatory.*"

The other questions concerning the validity of the charter of Carolina-Tennessee Power Company, under the Constitution of North Carolina, are so fully answered by the opinion of the Supreme Court of North Carolina in this case that we do not feel called upon to discuss them any further but will cite a few cases bearing on the subject.

Plaintiff in error insists that the charter of the defendant in error is unconstitutional and void and violates the Constitution of the United States, because the defendant in error is granted powers different from those

conferred upon like corporations by the general laws of North Carolina.

"The general laws of the State apply to a corporation organized under a special act so far *only* as the former are consistent with the latter."

Cook on Corporations, 7 Ed., Vol. I, Sec. 2, p. 5.

It has been held that the provisions of the General Statutes relative to corporations are not applicable to a special charter so far as the provisions of the special charter are inconsistent with those of the general statutes.

Hollis v. Drew, etc., Seminary, 95 N. Y., 166-174.

LeFevre v. Lefevre, 59 N. Y., 434.

Clarkson v. Hudson River, 49 N. Y., 455.

The same was held by the Supreme Court of North Carolina in this identical cause.

Power Co. v. Power Co., 171 N. C., 248, 255.

A railroad company which has rights granted to it by its charter may exercise those rights in the manner and for the purpose set out in the charter.

Railroad v. Railroad, 161 N. C., 531.

Atlanta, etc., R. R. v. So. Ry., 131 Fed., 657.

The Legislature may exempt corporations or particular corporations from the operation of general laws provided no constitutional provision is in the way.

Clark & Marshall on Corporations, page 383, Ed. of 1903, Section 127-B.

See also Edition of 1901, pages 107, 174.

Howland v. Myer, 3rd N. Y., 290.

Wood v. Wellington, 30 N. Y., 218.

In this last case it is said (page 223):

"These acts were passed subsequent to the revised statutes and so far as they prescribe a rule for the transfer of paper held by the Company different from that declared by the revised statutes, that must be deemed to overrule the former law."

"The well settled rule of construction where contradictory laws come in question, is that the law general must yield to the law special."

Noys Maxims, 19.

Stata v. Clark, 25 N. J. Law, 54.

A later private act repeals a previous public act *pro tanto*, *McGarvick v. State*, 30 N. J. Law, 510; *Township of Harrison v. Supervisors*, 117 Mich., 215.

The Supreme Court of North Carolina in discussing this doctrine says of a general statute, "But it is still in force except so far as it comes in conflict with or is repugnant to subsequent legislation. It is repealed on this ground so far as it relates to the University Railroad."

Hollaway v. Railroad, 85 N. C., 452, 455.

Where the charter of a railroad, plaintiff in a case, prescribed a different method for assessing damages to lands from that prescribed by the Code, which was passed subsequent to the charter of the plaintiff would prevail.

N. S. Ry. Co. v. Ely, 95 N. C., 77.

Besides it has been often held by the courts that legislation which has for its object the carrying out of a public purpose is not discriminatory if within the sphere of its operation it affects alike all persons similarly situated.

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the Fourteenth Amendment: "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. 113 U. S., 27, 32."

Hayes v. Missouri, 120 U. S., 68, 71.

In the decision of this case the Supreme Court of North Carolina, 175 N. C., 68, 678 to 679 (record page 278) will be found, with full citations of authorities, a clear, comprehensive and complete statement of the doctrine in question, as follows:

"In *Mugler v. Kansas*, 123 U. S., 623, the Court said in regard to the extent and operation of the Fourteenth Amendment upon local laws: 'But this Court has declared upon full consideration in *Barbier v. Connolly*, 113 U. S., 27, that the Fourteenth Amendment has no such effect. After observing, among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity,' which was quoted with approval by this Court in *S. v. Moore*, 104 N. C., p. 721, 722.

"And Judge Cooley says in his work on *Const. Limitations* (7 Ed.) at p. 555: 'The authority which legislates for the State at large must determine whether particular rules shall extend to the whole State and all its citizens or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the State may require or make acceptable different police regulations from those demanded in another, or call for different taxation and a different application of the public moneys. The Legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. These discriminations are made constantly, and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle.'

"And in the same work, at p. 554, Note 2, it is said: 'To make a statute a public law of general obligation, it

is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act,' citing *S. v. County Commissioners of Baltimore*, 29 Md., 516; *Pollock v. McClurkin*, 42 Ill., 370; *Haskel v. Burlington*, 39 Iowa, 232; *Unity v. Burrage*, 103 U. S., 447.

"This doctrine was approved by this Court in *S. v. Moore*, supra. The power to restrict legislation affecting public interests to certain localities was discussed and asserted in *S. v. Barrett*, 138 N. C., 630, the Court remarking that it had been so long and in so many instances recognized that it was not deemed necessary to re-examine the grounds upon which it rests."

See also *State v. Perley*, 173 N. C., 783, and *Perley v. State of N. C.*, 39 S. C. Rep. 357, 249 U. S., p—.

It has been often held by this Court that no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit.

Chicago and A. R. Co. v. Tranbarger, 238 U. S., 67 and cases cited.

The police power of a State may be used to promote public conveniences and general prosperity.

Chicago D. & Q. R. Co. v. Ill., 200 U. S., 561, wherein this Honorable Court says:

"The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not in words suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district and make them tillable or fit for cul-

tivation. We can not assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S., 285, 292; *Gilman v. Philadelphia*, 3 Wall. 713, 729; *Pound v. Turk*, 95 U. S., 459, 464; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S., 470.' See to the same effect, *Bacon v. Walker*, 204 U. S., 311, governing *Brown v. Walling*, 204 U. S., 320."

"It may be said in a general way that the police power extends to all the great public needs. *Canfield v. U. S.*, 167 U. S., 518. It may be better for the aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

Noble St. Bank v. Haskell, 219 U. S., 104, 111.

19. SECOND POINT OF PLAINTIFF IN ERROR.

On page 45 of the brief of the plaintiff in error counsel take the position that the plaintiff was not entitled to injunctive relief because the plaintiff did not own the "waterpower proposition" claimed by it. We have heard and read the discussion of plaintiff's counsel concerning this "waterpower proposition" on several previous occasions. To us it is rather an ethereal proposition. We confess we never have been able to see what they mean by "waterpower proposition." The reading of this record shows that the defendant in error was authorized to make hydro-electric developments, to build dams for other public works. The jury have found by the verdict, that the defendant had its works surveyed and staked out on the ground, and had plats or maps made thereof and filed the same in the office of the Clerk of the Court in the County where the land lies according to its charter, and duly adopted by appropriate corporate action these loca-

tions for its dams and public works, and had not abandoned the same, and the evidence showed that the defendant in error had acquired more than fifty per cent. of the property necessary for its development, and there was ample proof to sustain all these findings, and under the verdict of the jury we are unable to see what is meant by the alleged lack of ownership of the "waterpower proposition." The defendant in error owns the lands, made the surveys, adopted the plans, and is proceeding to make the developments, and under those circumstances we do not see that it makes much difference who owns that thing called the "proposition" referred to in the brief of the plaintiff in error.

20. THIRD POINT OF PLAINTIFF IN ERROR.

Counsel for the plaintiff in error in their brief, page 56, state: "The evidence disclosed that the plaintiff Company had never located any dam sites or made any locations for power plants on the Hiawassee River." The trouble with this argument is that it is not true as a matter of fact. The jury found by their verdict (record page 48) that the defendant in error had done the very things the plaintiff in error says it never had done, and the Supreme Court of North Carolina affirmed the judgment upon the evidence set out in the record. We will, therefore, not argue this question at all. In fact, the plaintiff in error admitted in the trial court that the locations for the dams of the defendant in error had been surveyed and staked out by the defendant in error. This appears from the answer to Issue No. 1. Plaintiff in error argues that the public works of the defendant was surveyed and staked out by a construction company. The undisputed evidence showed that the defendant in error employed a construction company to make all the developments. That the Construction Company employed the Ambursen Hydraulic Company to do the surveying and Ambursen Company employed one T. H. Verdell to perform the work and T. H. Verdell swore that he did perform it. Yet, in view of this undisputed testimony the

plaintiff still insists that the defendant made no surveys of its location. This point certainly needs no further elaboration.

21. FOURTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error in their brief, page 59, take the position that there was no evidence that the maps or plats of the works of the defendant in error were filed with the Clerk of the Superior Court. The great trouble with this position is also that it is not true in fact. Two witnesses (record pages 90 and 116) swore positively that they deposited, or filed, the maps in the office of the Clerk of the Superior Court of Cherokee County, on the 21st day of June, 1911, and the jury found by their verdict (record page 48) that these witnesses swore the truth. The Supreme Court of North Carolina affirmed this finding. This was purely a question of local law and a question of fact over which this court has no jurisdiction.

22. FIFTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error in their brief (record page 56) take the position that the defendant in error had abandoned its proposed public works. This question was submitted to a jury and found against the plaintiff in error. It was reviewed in the Supreme Court of North Carolina and that Court held that there was ample evidence to sustain the verdict of the jury. The Court also held that the instructions of the Judge to the jury upon the question of abandonment, as well as upon all other questions, were correct.

23. SIXTH POINT OF PLAINTIFF IN ERROR.

Counsel for the plaintiff in error on page 69 of their brief, take the position that the defendant in error is only a riparian land owner. A considerable portion of the brief is devoted to this argument. This, of course, is purely a local question—a question of State law. It was disposed of in the decision in this case in the Supreme Court of North Carolina (Power Co. v. Power Co., 175

N. C., 579; see record page 279). The position of the plaintiff in error on this question simply amounts to saying that the Legislature of North Carolina cannot grant to a corporation engaged in public service the power of eminent domain. Their position would repeal the law of eminent domain. There is no authority for any such position either in North Carolina or elsewhere.

24. SEVENTH POINT OF PLAINTIFF IN ERROR.

Counsel for plaintiff in error complain that injunction should not have been granted because no tender of compensation was made to the plaintiff in error in this case. This action is not a condemnation proceeding, but is one brought to determine which of the parties has the prior right to develop the waterpower of this river.

Power Co. v. Power Co., 171 N. C., 248, 257.

Power Co. v. Power Co., 175 N. C., 668, 679.

The case of Telluride Power Co. v. Rio Grande R. R. Co., 175 N. C., 639, is exactly similar to this proceeding. Of course, in the event the defendant in error is unable to purchase the property of the plaintiff in error for its proposed public works, it will bring a condemnation proceeding against the plaintiff in error, and in that condemnation proceeding, as provided by laws of North Carolina, it will be required to pay the plaintiff in error such damages as it may sustain by reason of such taking of its property. This is expressly provided for under the general laws of North Carolina and under the charter of the defendant company. (Record page 209-211).

Again, this question also is one purely of local or State law, and this Honorable Court will not undertake to review the same.

25. EIGHTH POINT OF PLAINTIFF IN ERROR.

On page 89 of the brief of plaintiff in error, it is insisted that an injunction should not have been granted in this case. This position we think is sufficiently answered by reference to the decision of the Supreme Court of North Carolina.

Power Co. v. Power Co., 175 N. C., 681-686.

Telluride Power Co. v. Rio Grande R. R. Co.,
175 U. S., 639-641.

26. NINTH POINT OF PLAINTIFF IN ERROR.

The other points presented in brief of plaintiff in error are attempts to point out errors of law in the instructions given by the trial judge to the jury, and in the decision of the Supreme Court of North Carolina, concerning questions of local law, which we insist this Court has no power to review, but which we insist were rightly decided in any event.

27. LOCATING PUBLIC WORKS.

Plaintiff in error insists there was no evidence that the defendant Company had located any public works on the Hiawassee River. To this we think there are three answers: First, the record contains ample testimony to the effect that the defendant made the surveys and locations for its dams and plants on the Hiawassee River. It employed Carolina Construction Corporation to do the surveying, build the dams, power houses, etc. (record pages 218-225). The Construction Corporation employed the Ambursen Hydraulic Company to do the surveying and certain other work (record pages 226-230). The Ambursen Company put T. H. Verdell in charge and he did the work (record pages 79 to 83), and the defendant company paid the expenses thereof (record page 56); second, it makes very little or no difference who did the surveying, measuring and planning for the work as those surveys were adopted and made the plaintiff's own by its proceedings, and the evidence clearly shows that this was done; third, the plaintiff in error agreed that the first issue which raised the question as to whether the surveys had been made and locations marked out by the plaintiff as alleged in the complaint, should be answered in the affirmative; it was alleged in the complaint that the plaintiff, defendant in error here, had made the surveys, and it follows notwithstanding the ingenuous argument to the contrary, that the plaintiff in error agreed on the trial in the Superior Court that the work had been done by the defendant in error. The law concerning the acquisition of locations for public works was settled in this case. (*Power Co. v. Power Co.*, 171 N. C., 248; *Street Railway Co. v. R. R.*, 142 N. C., 423).

The charter of the plaintiff Company, Section 8, (record page 209) provides: "And when the location of said works shall have been determined and a survey of the same deposited in the office of the Clerk of the Superior Court of the County in which said land lies, then it shall be lawful for said Company by its officers, agents, engineers, superintendents, contractors and others in its employ to enter upon, take possession of, have, hold, use and excavate and fill such lands and to erect all necessary and suitable structures for the erection, completion, repairing, and operating of said works, subject to such compensation as is hereinafter provided."

As between two rival railroad companies, each claiming the right of way on the same route over public lands, under the statute that one is prior in right which first definitely adopts the line on which his road is to be built by appropriate corporate action, and then files its maps of the location so adopted, since that is an essential act to initiate any right to a particular location.

Utah N. & C. R. R. Co. v. Utah & C. Ry. Co., 110 Fed., 879.

The making by the chief engineer of a survey and map and the marking of the proposed line by pins at irregular intervals indicating the center line of the track, the curves being run in and marked, but the cuts and fills not being indicated in any way, and the subsequent authorization by the directors to construct along this way, was held a sufficient location to prevent another road obtaining that route, although nothing further was actually done toward the construction.

Pittsburg & C. Ry. Co. v. Pittsburg & C. and S. L. Ry Co., 159 Pa., 331; 28 Atlantic, 155.

The Supreme Court of Indiana in one case says: "We are, however, impressed with the view, since railroad corporations are authorized to acquire title by negotiation for right of way purposes, and since condemnation in such a case is wholly unnecessary, and as the map and profile may be filed at any time before the construction, that, as to its own lands and possibly as to other lands, as against rival corporations, the filing of the map

and profile should be considered as such inchoate appropriation of the property for public purposes as to prevent, in the absence of undue delay, an appropriation of it by another company."

Southern Indiana Ry. Co. v Indianapolis, etc., Co., 13 L. R. A. (N. S.), 197.

Where a railroad company surveys its line of railroad and locates the same as provided by its charter, it acquires a superior right over its entire route so surveyed and located.

Barre Co. v. Montpelier, etc., Co., 4 L. R. A., 785.

On a question of location between two rival companies, that which first made a survey and staked out its right of way is entitled to a priority of right.

New Brighton, etc., Co. v. Pittsburg, etc., Co., 105 Pa., 13.

Davis v. Titusville, etc., Co., 114 Pa., 308.

In the last case the location was made in 1870-71 and the road partly graded. Nothing further was done for many years, but the Court held that the locating was sufficient and that a present and subsequent lessee of lands on which the location had been made acquired no rights.

In the case of *Morris and Essex R. R. Co. v. Blair*, 9 N. J. Eq., it was held that a survey previously made by an individual and adopted by a corporation afterwards organized and then filed and recorded, took effect from such filing and recording.

Atlanta K. & N. Railway Company v. Southern Railway Company, 131 Fed., 657; 66 "C. C. A.," 601.

The bringing of a condemnation proceeding by one railroad company over a tract of land previously acquired by another railway company for the purpose of a right of way, although the deed to the latter railway company has not been put to record, does not give a priority to the railway company which instituted the condemnation proceedings, under the Tennessee statute which provides that such proceeding shall effect only the interest of the parties thereto and unborn remaindermen, the grantee company not being a party.

Section 1574 of the Revisal of 1905 provides "that only the interest of such parties as are brought before the Court shall be condemned in any such proceeding."

A proceeding to compel an appropriation is at least but a substitute for *an acquisition by contact* and no *superior equity is acquired by the institution of a suit for the purpose of condemnation over a prior agreement* for the acquisition of the same interest valid between the parties, especially when its prior rights are known to the petitioner when he started his proceedings.

"Treating the question as one of priority between mere equities and each as equally innocent, the claimant first in order of time has by virtue of that circumstance the better right. He who is superior in time, in the absence of some higher equity, has by virtue of that circumstance alone the better right to the matter in dispute."

M. & S. P. R. Co. v. Chicago, M. & S. P. R. Co.,
88 N. W., 1082.

Knowledge of the existence of a contract for a right of way over a tract of land at the time of the institution of the condemnation proceeding puts the party instituting such proceeding on notice of the prior right of the grantee in the contract, and the fact that the contract was not on record or in writing is of no importance.

Sioux City & D. M. Ry. Co. v. Chicago, M. & St.
P. Railway Co., 27 Fed., 770.

The complainant was a corporation created for the purpose of building a railway from Sioux City to Des Moines, the construction of which had been commenced. The defendant desired to condemn a right of way over the premises described in the bill for the purpose of building a road from Sioux City to Defiance. Defendant, on the 19th of April, 1886, instituted condemnation proceedings over the premises. The complaint in the month of October, 1885, as it alleged, had located its line of road, surveyed the same over the land described in the bill for the purpose and with the intent of constructing the same, and it had commenced the construction over a part of the land; that it had also prior to the commencement of the condemnation proceedings purchased from the owners

certain tracts of land for its right of way, and that when it became evident that the complainant intended to construct its road the defendant instituted condemnation proceedings. Injunction was sought. The facts are stated as follows:

"The Chicago, Milwaukee and St. Paul Railway Company, in its answer to said bill, avers that for several years past the defendant company has had in contemplation the construction of a line of railway from Sioux City to Defiance, thus connecting its system of railway in Dakota with its through line from Council Bluffs to Chicago; that in pursuance of such plan, in the summer of 1881, it caused surveys to be made for such line, and in the fall of 1881 it located the same; that in the year 1883 it procured, by ordinance duly passed, the right to lay a double track along Second street, in said Sioux City, to the eastern limits of the city, and did, during that year, construct its track easterly along said street to within a few feet of the eastern corporate limits of said city, the same being done as the commencement of its said line to Defiance; that in October, 1884, it purchased 15 lots in Felt's addition to Sioux City, lying next east of the city limits, in direct line with the location of defendant's road, and did also purchase of said Felt a piece of land contiguous to and bounded by said lots and extending to the middle of the Floyd River, the same being purchased so as to secure the right of way for the construction of said line to Defiance; that in June, 1885, it retraced its located line and permanently located the same between Sioux City and Defiance, the same being marked with stakes driven in the center of the line at a distance of 100 feet, and that defendant's line over all the premises in the bill described was permanently located in June, 1885; that, having decided to immediately construct said Defiance line, it did, on the morning of the 15th day of April, 1886, commence to negotiate and contract for the right of way along said line obtaining by purchase such right of way over certain premises set forth in the answer; admits that on the 19th of April, 1886, at its request, commissioners for the appraisal of damages were appointed; and further avers that complainant well knew that defendant was intending

to construct its located line from Sioux City to Defiance, and had commenced procuring the right of way, and that, in fraud of the rights of defendant and in some cases by misrepresentations, complainant procured conveyances of the premises and right of way in the bill described, but that the same were not procured until after the defendant company had initiated proceedings in condemnation."

The question presented was, which railway company had the prior right? The Court says:

"It is certainly *equitable that a company which in good faith surveys and locates a line of railway, and pays the expense thereof*, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity. The right to the use of the right of way is a public not a private right. It is, in fact, a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. The owner can not, by conveying the right of way to A, thereby prevent the State from granting the right to B, and, subject to the right of compensation to the owner, the State has the contral over the right of way, and can, by statute, prescribe when and by what acts the right thereto shall vest, and also what shall constitute an abandonment of such right."

The Court further says that when a railroad company has ascertained and located where its road shall be, it is not competent for another company to step in and take its route, agree with the owners and occupy the land. The injustice and injury to private and public rights which would arise were it held that after the company has duly surveyed and located its line of railway and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the rights of way over parts of the located line and prevent the construction of the road, is a strong reason for holding that the first location, if made

in good faith and followed up with reasonable diligence, may confer a prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location but before the commencement of the condemnation proceedings.

Cumberland Railroad Company v. Pine Mountain Railroad Company, and Pine Mountain Railroad Company v. Cumberland Railroad Company, 96 Southwestern, 199.

These were actions decided in the Supreme Court of Kentucky. Each of the actions was brought by each of the parties against the other to enjoin the defendant in each case from acquiring a right of way for a railroad over the location claimed by the plaintiff in each case.

1st. Where a railroad company had full notice of a prior survey at the time it attempted to make a similar survey over the same route, it was immaterial to the priority of the company making the first survey that it did not first file for record a map of its location as required by the Kentucky statute.

2d. Where a railroad has actually located its right of way and is in good faith following up its location by buying land or instituting condemnation proceedings with reasonable diligence, another company can not go to a point on the route which is neither the beginning nor the end of its proposed line and locate a right of way on the same line.

In this case the Cumberland Railroad Company made a survey over the disputed ground first, but the Pine Mountain Company as it went along made maps of its route as located and filed the same in the office of the Clerk of the Court, and this company by action of its board of directors adopted the route so selected. The Cumberland company filed its map also, but after the map of the Pine Mountain company had been filed. "*There was no express action of the directors of the Cumberland company approving the location of the route as made by its engineers, but as they went along it took deeds for the right of way from such persons as were willing to sell and instituted proceedings to condemn the lands of those*

with whom it could make no contract. The Pine Mountain company took like deeds and instituted like proceedings."

The Court concludes as follows:

"The purpose of requiring a map to be filed under section 767, Ky., St. 1903, is to give notice of the location of the right of way. The map, when properly lodged for record, is constructive notice, just as a deed properly lodged for record; but if a person has actual notice of the location of the right of way, the fact that the map was not filed can not be relied on by him. When the engineers of the Pine Mountain Railroad Company went to Greasy Gap and began their work the right of way of the Cumberland Railroad Company had been located through this territory four days before. The stakes were on the ground, the tents of the surveying party were to be seen, and the Pine Mountain company had full notice of the situation when it undertook to begin its survey at this point in the middle of its proposed line. We therefore conclude that the fact that the map of the Cumberland Railroad Company was not filed is not material, and that it is also immaterial that the Pine Mountain company first filed its map. *When a company has actually located its right of way, and is in good faith following up its location by buying the land or instituting proceedings to condemn it with reasonable diligence,* another company can not go to a point on the route which is neither the beginning nor the ending of its proposed line and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus. The railroad company is authorized to take land under eminent domain, and when it has in good faith entered for this purpose, located its right of way and is proceeding to perfect its right, the law prefers him who thus first enters in good faith, and it can not be permitted that another company with notice of his rights shall make another survey right behind him and destroy his priority which he has thus gained. While it is true that on some days the Pine Mountain company's engineers were ahead of the Cumberland company's engineers, they got thus ahead by beginning in the middle of the line and then running a race with the other people. The statute does

not contemplate this. It contemplates a location in good faith and in the usual course of business.

"Under all the circumstances we conclude that the Cumberland company has the better right. The motion to discharge the injunction granted to it is overruled. The motion to discharge the injunction granted in favor of the Pine Mountain Railroad Company is sustained, and that injunction is dissolved."

Milwaukee, L. H. & T. Co. v. Milwaukee Northern R. Co., 132 Wis., 313 (1907); 112 N. W., 663.

P made a tentative survey route beginning September, 1903; completed its field notes in 1905; completed its maps January 16, 1906; adopted route January 16, 1906, and began condemnation suit February 15, 1906.

D's promoters *began survey in October, 1905, and at same time took options. October 25, 1905, D organized and immediately authorized officers to acquire right of way franchises and appropriate money. Survey completed November, 1905, and nine miles of the route surveyed conflicted with P's route. Prior to January 16, 1906, D had taken over the options acquired by its promoters but had not acquired title to any of its rights of way nor had entered into binding contracts for the acquisition of such.*

The Court held that the P had made no valid location prior to January 16, 1906, and that prior to that time the defendant had made a location and was entitled to priority. *It held that the adoption of a route was evidenced by the acts of the D before January 16, and that such acts were sufficient to take the place of a formal adoption.*

The Court said, page 355, referring to the acts evidencing the intention to adopt the route:

"It is plain, however, that it must be a determination made with the present intention in good faith to locate the line upon that route and construct the same with reasonable diligence."

2 Eliot on Railroads, sec. 927.

"When a proposed line has been regularly located and staked off, and the expense thereof has been paid, the

corporation by which it is done has a prior claim to the right of way for a reasonable time, which can not be defeated by another company that procures voluntary conveyances from the owners before the proceedings in condemnation instituted by the first company have terminated."

Denver and R. G. Ry. Co. v. Alling, 99 U. S., 463.

In 1871-1872 the Denver company made a close preliminary survey of its line through a canon. No work was done in building its line through the canon until April 19, 1878. The Canon City Company was incorporated in 1877 and its plans and locations were approved by the Secretary of the Interior in the same year. Its plans contemplated the construction of its road through the same canon. It attempted to commence work on April 20, 1878. Each company brought an action to restrain the other. For the Canon City Company it was contended (page 477) that the Denver company

"had lost whatever rights it acquired in the canon through the imperfect survey of 1871 and 1872 by its long inaction after the construction of the road to Canon City, and by its failure, within a reasonable period, to follow up those surveys by actual location and occupancy for railroad purposes. The conduct of the Denver company, it is urged, evinced a settled purpose upon its part to abandon its grant of a right of way through that canon. The answer to all this seems very obvious.

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"Nor had they sufficient reason to suppose that the Denver company had finally abandoned its purpose of constructing a road through the canon. We have already referred to the completion of the road from Denver to Pueblo, and from Pueblo to Canon City, by July, 1875. In 1873 the Denver company commenced the construction of one of its branches—the Denver and Southern Railway. Commencing at Pueblo, it completed that road to Cucharas, fifty miles from Pueblo, by February, 1876; to Garland, sixty

miles from there, by August, 1877; and to the valley of the Rio Grande, by July, 1878. After July, 1875, the company, it is true, suspended active work upon the line west of Canon City. But the cause of such suspension, as its officers testify, was the widespread depression in business and financial circles, and the belief, shared by all interested in the prosperity of the company, that the extension of the line southward from Pueblo gave promise of quicker returns and more immediate results in every way. *They state that it was the purpose of the company to resume work upon its line through the canon as soon as the necessary means therefor could be obtained, and that there was no intention at any time to abandon the route west of Canon City.* Their delay in the construction of the road west of Canon City and through the Grand Canon seems to have been in the interest of the stockholders they represented, and not inconsistent with an honest purpose, within the period fixed by law, to meet the objects for which Congress granted to it the right of way. Its surveys of 1871-72, followed by an occupancy of the canon on the 19th of April, 1878, in advance of the Canon City Company, for the purpose of constructing its road through that defile, was, in our judgment, a final appropriation of the way granted by Congress. The Denver company then, if not before, came into the enjoyment of the present beneficial easement conferred by the act of June 8, 1872, and was entitled to have secured against all intruders whatever privileges or advantages belonged to that position."

3. FORMAL ACTION BY RESOLUTION OF DIRECTORS
NOT NECESSARY.

From an examination of several of the foregoing authorities it will be seen that no formal resolution of the corporation is necessary to adopt a location. In our case there were formal resolutions, to wit, those of May 28,

1909, and in fact the resolutions of August 17, 1914, were prior to the commencement of the action and would be sufficient for the purposes of this suit; but, as above stated, in a number of cases it has been held that decisive, definite corporate acts showing the adoption of the locations by the company is sufficient. Here we have surveys made, the maps approved by the company and filed for record, a large number of tracts of land purchased calling for the dam sites as located on the maps and for the contour lines of the dams, a large amount of money spent and all of the acts and things set forth in the statement of facts and the testimony in this case which were done by the plaintiff in State court.

In the case of *Cumberland Railroad Company v. Pine Mountain Railroad Co.*, 96 Southwestern, 199, the Court says:

"There was no express action of the directors of the Cumberland company approving the location of the route as made by its engineers, but as they went along it took deeds for the right of way from such persons as were willing to sell and instituted proceedings to condemn the lands of those with whom it could make no contract."

These acts on the part of the company were held to be sufficiently definite and decisive to show its purpose to make the developments. Again, in the same case, the Court says:

"When the company has actually located its right of way, and is in good faith following up its location by buying the land and instituting proceedings to condemn it with reasonable diligence, another company can not go to a point on the route, which is neither the beginning nor the end of its proposed line, and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus."

See also Elliott on Railroads, sec. 927.

The Supreme Court of Wisconsin, in the case *In re Milwaukee Light, Heat and Traction Co.*, 112 Northwestern, p. 663, says:

"In such case the prize would go to the company which first secured a completed location. So it appears that prior to January 16, 1906, the respondent company

had made or adopted a fully completed survey over the disputed lands, and determined in good faith to build its railroad thereon, had secured all the necessary franchises and crossing privileges from towns and villages, and had obtained option contracts on all but a very small fraction of said lands, and intended in good faith to utilize such options and take deeds of the lands at an early date. These are very decisive acts, and unless it be necessary that it should have actually secured deeds or binding contracts to purchase the lands, these acts must be held to constitute a completed location, so far at least as to give precedence in a contest with a rival company seeking to obtain the same lands. Certainly it was not necessary that it should have paid for the lands or secured deeds. As to all the world except the owner, the appropriation of land for railroad purposes may be complete without either of these steps, and the only question then is whether it was necessary that it should have bound itself by contract to purchase the lands. We think not. The essential requirement is, not that there should be a completed purchase, but that there should be a decisive corporate action taken in good faith locating the route and committing the corporation to that route, though not necessarily irrevocably. The securing of option contracts over practically the whole line surveyed, with the bona fide intention of utilizing them and completing the purchases and building the line, must be held to be such a decisive act, and we therefore hold that the petition for condemnation was properly denied."

Where all stockholders acquiesce in a proceeding no formal vote is necessary.

Benbow v. Cook, 115 N. C., 325, 331.

In re Griffin Iron Co., 41 Atl., 933.

Hill v. R. R., 143 N. C., 539, 554, 556.

See also the note to the case of *Fayetteville Street Ry. Co. v. Railway Co.*, as reported in 9 Ann. Cases, p. 689, where a large number of cases are cited bearing on the question involved.

"A survey staked out upon the ground as the center line, a preliminary line, or an actual location, whether delineated on paper or not, if adopted by the corporation,

is the location giving the company first making such location a right superior to that of any other company."

Chesapeake, etc., Ry. Co. v. Deep Water R. Co.,
57 W. Va., 641; 50 Southeastern, 859.

The first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative action."

Fayetteville St. Ry. Co. v. Railway Co., 142 N.
C., 423.

Rochester, etc., Co. v. New York, etc., R. Co., 110
N. Y., 128.

4. WATER-POWER COMPANY.

A very thorough examination of the authorities has enabled us to find two cases decided prior to the present controversy which adopt the foregoing principles to their fullest extent in their application to the location for water-power developments. Both of these cases are to be found in the California Reports.

By this Court it was held that if a water-power company start proceedings under the statute to get a title after like proceedings for acquiring title have been commenced by another company, and there is a condemnation and payment in both proceedings, as between the companies, the lands belong to the one over whose proceedings the Court first acquired jurisdiction.

Lake Merced Water Co. v. Cowles, 31 Cal., 215.

Where a water-power company located its works on a stream and acquired by negotiations with the owners lands on which it built a small plant, it was held that a company subsequently endeavoring to secure the same property by compulsory proceedings could not do so.

San Francisco, etc., Water Co. v. Alameda Water
Co., 36 Cal., 639.

The facts were as follows: Two corporations were organized for the purpose of supplying water to the city and county of San Francisco. Respondent immediately after its certificate of incorporation had been filed, that is, between June 6 and June 20, 1865, purchased and entered into the possession of 160 acres of land in Alameda County, in Alameda Canon, on Alameda Creek, and

erected dams thereon as the initiative of its works for diverting and appropriating *all the waters of said creek above said dams*. Thereafter, on the 24th of June, 1865, while respondent was so in actual possession of its lands and dams thereon, and engaged in the construction of works necessary to the complete appropriation of the waters of the stream, the appellant instituted proceedings before the County Court to condemn the waters of Alameda Creek which extended through the lands of the respondent and much other lands on Alameda Creek which had not been acquired by the respondent. The Court decided in favor of the respondent and held that it was entitled to appropriate *all the waters of Alameda Creek* by reason of its prior location, and says in the conclusion of the opinion:

"Respondent therein having, prior to the institution of appellant's proceedings to condemn, secured essential property rights in the premises thereby sought to be condemned by successful negotiations and the construction of works necessary to the appropriation of the waters to accomplish all the business of its incorporation, we can discover no just grounds for subordinating its rights thus acquired to the subsequent effort of appellant to acquire the same property for similar purposes by compulsory process of acquisition."

CONCLUSION

The other questions attempted to be raised by the brief and argument of counsel for the plaintiff in error, are plainly questions of State law over which this Court has no jurisdiction. The questions thus referred to are the questions of abandonment by the defendant in error of its location for its public works, the question of competency as evidence of certain deeds of conveyance taken by the plaintiff in error for some of the lands claimed by it, after this action was brought in the Superior Court of Cherokee County, North Carolina, and the question of the instructions of the Judge to the jury on the law concerning the acquisition of locations for public works, and the law of abandonment. An examination of the opinion

of the Supreme Court of North Carolina will show that these questions were all fully considered by the Supreme Court of North Carolina, and all of the objections to the testimony and the charge of the Court overruled. A further examination of the authorities bearing on these several questions will show plainly that the Supreme Court of North Carolina committed no error in its holdings.

This controversy has been pending for a number of years. The jury by their verdict (record page 48) found all of the facts in favor of the defendant in error, finding that in accordance with the laws of North Carolina it had surveyed, staked out, and located its public works, and had duly adopted said locations by authoritative corporate action, and that it had duly filed its plats and surveys of said locations as required by the terms of its charter, and that it had not abandoned its proposed locations, and under the laws of North Carolina this finding by the jury entitled the defendant in error to proceed without interference or interruption to the building of its public works.

The jury further found that the locations claimed by the plaintiff in error had been surveyed and staked out prior to the organization of the plaintiff in error Corporation. This finding was made by consent, but the jury further found that the plaintiff in error had not adopted said locations for its public works and therefore the plaintiff in error was left in the same position as any other property holder along the water course where the public works are to be established. The finding by the jury that the defendant in error had duly adopted said locations withdrew the property thus covered by the proposed improvements of the defendant in error from occupancy by any other like corporation. It is impossible that both companies should develop the same water powers at the same time. The Court in order to protect the prior rights of the defendant in error, enjoined the plaintiff in error from further interference. The decision was clearly right and clearly in accordance with the law, as laid down in numerous decisions cited in this brief.

We therefore submit the following as conclusions:

1. Writ of Error should be dismissed for want of jurisdiction in this Honorable Court.

2. If the writ of error is not dismissed then the judgment should be affirmed on the record, as no errors of any kind have been pointed out, and especially have no errors been pointed out of which this Court has jurisdiction.

This January 5th, 1920.

JULIUS C. MARTIN,
THOS. S. ROLLINS,
GEO. H. WRIGHT,
Counsel for Defendant in Error.

Counsel for Parties.

HIAWASSEE RIVER POWER COMPANY v. CAROLINA-TENNESSEE POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 208. Argued January 30, 1920.—Decided March 22, 1920.

The question whether a special act of a state legislature chartering a power company contravenes the equal protection and privileges and immunities clauses of the Fourteenth Amendment because it grants powers of eminent domain not conferred on a rival company organized under a general law, is not necessarily decided by a ruling of a state trial court, in a suit by the former company against the latter to quiet title, admitting the special charter in evidence over defendant's objection that it is void under the state bill of rights and constitution and violates the Fourteenth Amendment; nor is such question raised in the state Supreme Court by an assignment alleging merely that the trial court erred in admitting such evidence, and not mentioning the Amendment. P. 342.

A constitutional question not presented by assignment of errors or otherwise, or passed upon, in the state Supreme Court, does not afford jurisdiction under Jud. Code, § 237; an attempt to raise it by the petition for a writ of error from this court and the assignment filed here, is too late, and allowance of the writ by the chief justice of the state court does not cure the omission. P. 343.

Writ of error to review 175 N. Car. 668, dismissed.

THE case is stated in the opinion.

Mr. Eugene R. Black, with whom *Mr. Sanders McDaniel*, *Mr. J. N. Moody*, *Mr. Felix Alley* and *Mr. Zebulon Weaver* were on the briefs, for plaintiff in error.

Mr. Julius C. Martin, with whom *Mr. Thos. S. Rollins* and *Mr. Geo. H. Wright* were on the brief, for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Carolina-Tennessee Power Company, a public utility, was incorporated by a private law of North Carolina with broad powers, including that of taking by eminent domain riparian lands of and water rights in any non-navigable stream of the State. It filed locations for two hydro-electric plants on the Hiwassee River and proceeded to acquire by purchase and by condemnation the lands and water rights necessary for that development. Thereafter the Hiwassee River Power Company was organized under the general laws of the State and threatened to locate and develop on that river hydro-electric plants which would necessarily interfere with the development undertaken by the Carolina-Tennessee Company. The latter brought in the Superior Court of Cherokee County a suit in the nature of a bill to quiet title. The case was tried in that court with the aid of a jury. Many issues of fact were raised and many questions of state law presented. A decree entered for the plaintiff below was reversed by the Supreme Court of the State and a new trial was ordered (171 N. Car. 248). The second trial resulted also in a decree for plaintiff below which was affirmed by the state Supreme Court (175 N. Car. 668). The case comes here on writ of error.

The federal question relied upon as giving jurisdiction to this court is denial of the claim that the private law incorporating the Carolina-Tennessee Company is invalid, because it conferred upon that company broad powers of eminent domain, whereas the general law, under which the Hiwassee Company was later organized, conferred no such right; the contention being that thereby the guaranty of the Fourteenth Amendment of privileges and immunities and equal protection of the laws had been violated. But this claim was not presented to nor passed upon by the

Supreme Court of the State. The only basis for the contention that it was so presented is the fact, that, when the Carolina-Tennessee Company offered in evidence at the trial in the Superior Court the private law as its charter, objection was made to its admission "on the ground that the same was in terms and effect a monopoly and a void exercise of power by the State Legislature which undertook to provide it, it being opposed and obnoxious to the bill of rights and the Constitution and in violation of the Fourteenth Amendment;" and that the admission of this evidence is among the many errors assigned in the Supreme Court of the State. The law, whether valid or invalid, was clearly admissible in evidence, as it was the foundation of the equity asserted in the bill. No right under the Federal Constitution was necessarily involved in that ruling. The reference to the "bill of rights and the Constitution" made when objecting to the admissibility of the evidence was to the state constitution and the point was not again called to the attention of that court. Compare *Hulbert v. Chicago*, 202 U. S. 275, 279, 280. The claim of invalidity under the state constitution was specifically urged in that court as a reason why the Carolina-Tennessee Company should be denied relief and the claim was passed upon adversely to the plaintiff in error; but no reference was made in that connection to the Fourteenth Amendment.

If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see *Clarke v. McDade*, 165 U. S. 168, 172; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Marvin v. Trout*, 199 U. S. 212, 217, 224), still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the State no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or

passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, Indianapolis & Louisville Ry. Co. v. McGuire*, 196 U. S. 128, 132. The omission to set it up properly in the Supreme Court of the State was not cured by the allowance of the writ of error by its Chief Justice. *Appleby v. Buffalo*, 221 U. S. 524, 529; *Hulbert v. Chicago*, 202 U. S. 275, 280; *Marvin v. Trout*, 199 U. S. 212, 223.

We have no occasion, therefore, to consider whether the claim of denial of rights under the Fourteenth Amendment was of the substantial character which is required to support a writ of error. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308, 311. Compare *Henderson Light & Power Co. v. Blue Ridge Interurban Ry. Co.*, 243 U. S. 563.

Dismissed for want of jurisdiction.